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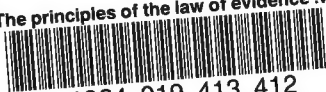
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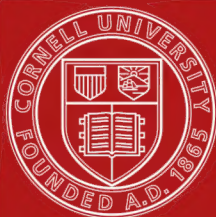
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**The principles of the law of evidence :w**



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THE PRINCIPLES  
OF THE  
LAW OF EVIDENCE

WITH ELEMENTARY RULES FOR CONDUCTING  
THE EXAMINATION  
AND  
CROSS-EXAMINATION OF WITNESSES

By <sup>William</sup> W. M. <sup>Awdesley</sup> BEST, A.M., LL.B.

FIRST AMERICAN, FROM THE SIXTH LONDON EDITION OF  
JOHN A. RUSSELL, Esq., LL. B.

BY  
JAMES APPLETON MORGAN, Esq.  
OF THE NEW YORK BAR. AUTHOR OF "THE LAW OF LITERATURE," AND AMERICAN EDITOR  
OF "ADDISON ON CONTRACTS," ETC., ETC.

IN TWO VOLUMES

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## AMERICAN EDITOR'S PREFACE.

THE text selected for the present Edition of the late Mr. Best's learned treatise, is that of the Sixth London Edition, prepared by Mr. Russell.

It having been apparent to the American Editor that—in so far as books and chapters were concerned—a somewhat arbitrary division of the work into two volumes would become necessary—he has endeavored to conform that division, as far as possible, to the Author's plan in the text itself. The first volume, therefore, will be found to treat principally of THE THEORY OF EVIDENCE IN GENERAL; while the second is entirely devoted to an examination of the RULES AND PRINCIPLES REGULATING THE DIFFERENT BRANCHES AND SORTS OF EVIDENCE, as presented in Courts of Justice. Owing to this division, by far the heaviest annotation naturally falls into the second volume, an inequality which could not well be avoided. An entirely new Analytical Table of Contents to each volume has been prepared, and a new Index and Table of English and American Cases will follow the text of the second volume.

JAMES APPLETON MORGAN.

229 BROADWAY, NEW YORK.

*August 1, 1875.*



# ADVERTISEMENT

TO THE SIXTH EDITION.

MY friend, the learned Author of this Work, stated, in his original Preface, that the design of the Work was, “not to add to the practical treatises by which the subject had been illustrated, but to examine the principles on which its rules were founded,—tracing them to their sources, and showing their connection with each other;” and I have kept this design steadily in view, in preparing the present edition for the press.

JOHN A. RUSSELL.

TEMPLE,

*January 2, 1875.*





## ORIGINAL PREFACE.

THE common-law system of evidence, in its actual state the growth of the last two centuries, must ever claim the highest respect and admiration as a whole, however particular portions of it may be justly or unjustly condemned. Now, the design of the present Work is not to add to the practical treatises by which the subject has been illustrated, but to examine the principles on which its rules are founded, tracing them to their sources, and showing their connection with each other. To this are annexed a sketch of the practice relative to the offering and receiving evidence at trials, and a few elementary precepts, founded chiefly on those of Quintilian, for the guidance of young practitioners in interrogating witnesses.

Throughout the book, particularly in the Introduction when treating of judicial evidence in the abstract, much assistance has been derived from the Roman law the civil, ians, and other foreign writers ; and especially from the able work published by M. Bonnier, at Paris, in 1843 entitled "*Traité Théorique et Pratique des Preuves en Droit Civil et en Droit Criminel.*" Large use has also been made of "*Bentham's Rationale of Judicial Evidence,*" in five volumes, London, 1827 ; in which the general principles of evidence are ably discussed, and often happily illustrated.

That book should, however, be read with caution, as it embodies several essentially mistaken views relative to the nature of judicial evidence, and which may be traced to overlooking the characteristic features whereby it is distinguished from other kinds of evidence. Some of these errors will be pointed out in the Introduction.

The Author begs to express his grateful acknowledgments for suggestions from many friends. The Index has been compiled by Mr. H. Macnamara, of the Inner Temple.

CHANCERY LANE,

*July, 1849.*

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# THE

# PRINCIPLES OF EVIDENCE

## INTRODUCTION

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**I.** LAW has been correctly defined a rule of human action, prescribed and promulgated by sovereign authority, and enforced by sanction of reward or punishment. But although human actions are the subject-matter about which law is conversant, they are not essential to its existence ; for the rule is the same whether its application is called forth or not. "If you commit murder or steal, you shall be punished;" "if you buy a man's lands or goods you shall pay for them ;" would hold true as rules of law, though no murder or theft were ever committed, and though every debt contracted were faithfully discharged. The rule continues in abstraction and theory, until an act is done on which it can attach, and assume, as it were, a body and shape. The maxim of jurists and lawyers "*ex facto oritur jus*," (*a*) and such like, must be understood in this sense ; and the duty of judicial tribunals, consequently, embraces the investigation of doubtful or disputed facts,

(*a*) 3 Blackst. Com. 329 ; 2 Inst. 49.

as well as the application of the principles of jurisprudence to such as are ascertained.

2. Facts which come in question in courts of justice, are inquired into and determined in precisely the same way as doubtful or disputed facts are inquired into and determined by mankind in general, except so far as positive law has interposed with artificial rules, to secure impartiality and accuracy of decision, or exclude collateral mischiefs likely to result from the investigation. And this is strictly analogous to the relation between natural and municipal law, of which it has been well observed, "There are in nature certain fountains of justice, whence all civil laws are derived but as streams: and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountains." (*b*) As, therefore, the study of natural law precedes that of municipal, so an inquiry into the natural resources of the human mind for the investigation of truth, should precede an examination of the artificial means devised for its assistance: and the present Introduction will accordingly consist of two Parts devoted to these respective subjects.

(*b*) Bacon on the Advancement of Learning, Book 2

# PART I

## EVIDENCE AND PROOF IN GENERAL.

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3. The human understanding may be considered in three points of view, namely: with respect to the sources of our ideas; the objects about which the human mind is conversant; and the intensity of our persuasions as to the truth or falsehood of facts or propositions.

4. 1<sup>o</sup>. The best metaphysicians trace all our ideas to the sources of sensation or of reflection. (c) There

(c) Locke on the Human Understanding, bk. 2, ch. 1, and passim. The classification of ideas into those of sensation and reflection, as the terms are here explained, includes those ideas which modern authors attribute to faculties they call "consciousness, spontaneity," &c. The truth of this part of Locke's ideal theory, when thus understood, seems admitted even by Stewart, Reid, and Cousin, who have so severely attacked it in other respects (See Stewart's

Philosophical Essays, Essay 1, ch. 2, pp. 85, 86, 3d Ed.; Stewart's Philosophy of the Human Mind, vol. 1, ch. 1, sec. 4, 6th Ed.; Reid on the Powers of the Human Mind, vol. 1, Essay 3, th. 5; Cousin, Cours de l'Histoire de la Philosophie, &c., vol. 2, pp. 131 and 389); and, notwithstanding some passages in his Essay, it may be a question whether such were not the meaning of Locke himself. In citing that eminent metaphysician, we do not hold ourselves



appear to be two kinds of sensation ; (*d*) 1. The internal sense—the intuitive perception of our own existence, and of what is actually passing in our minds. Of all forms of knowledge or persuasion this is the clearest and most indubitable ; and it is the basis of every other. Descartes and Locke, however different their systems in other respects, agree in this. “Ego cogito, ergo sum,” is the celebrated maxim of the former : (*e*) “If I doubt of all other things,” says the latter, (*f*) “that very doubt makes me perceive my own existence, and will not suffer me to doubt of that.” “The sceptics,” observes Sir Thomas Brown, (*g*) “that affirmed they knew nothing, even in that opinion confute themselves, and thought they knew more than all the world besides.” And according to a scholastic maxim, “Nihil est in intellectu, quod non fuerit in sensu,” (*h*) to which Leibnitz sagaciously adds, “nisi ipse intellectus.” (*i*) 2. The external sense—the faculty whereby the perception of the presence of external objects, is conveyed to the mind through our outward senses. (*k*) All our other ideas are formed from the above by the operations of “reflection ;” (*l*) which may be defined,

accountable for *all* his views or language, far less for every consequence that may be deduced from them.

(*d*) Bonnier, *Traité des Preuves*, §§ 6 and 7, 2d Ed. Locke in loc. cit. § 4, uses “internal sense” to signify “reflection.”

(*e*) *Principia Philosophiæ*, pars 1, n. 7.

(*f*) Locke on the Human Understanding, bk. 4, ch. 9, § 3.

(*g*) *Religio Medici*, sec. 55. “Que penser d’un juge qui méconnaîtrait sa propre existence ? Mais une pareille supposition est inadmissible. La

chicane la plus audacieuse n’oserait soulever de pareils doutes. L’évidence interne est la base de toute certitude judiciaire, comme de toute certitude en général ; mais c’est une base incontestée et incontestable.” Bonnier, *Traité des Preuves*, § 19, 2d Ed.

(*h*) *Encyclop. Britan.* 1st Dissertation, pp. 113, 114.

(*i*) See his works, vol. 5, p. 359 *Genev.* 1768.

(*k*) Locke, bk. 2, ch. 1 ; Bonnier *Traité des Preuves*, § 8, 2d Ed.

(*l*) Locke, bk. 2, ch. 1.

that faculty through which the mind is supplied with ideas by any sort of act or operation of its own, either on ideas received directly through the senses, or on other ideas, either immediately or mediately traceable to ideas so received.

5. 2<sup>o</sup>. The human mind is conversant about two classes of objects. (*m*) 1. The relations between its ideas. (*n*) Under this head comes mathematical and such like truths; where it is obvious that the relations of our ideas to each other may be true, although there be nothing without the mind, corresponding to the ideas within it. The properties of an equilateral triangle or circle, for instance, are equally indisputable whether a perfect equilateral triangle or perfect circle can be found in the universe or not; (*o*) and astronomers investigate the curves which bodies would describe, if acted on by forces, which, so far as we are aware, have no patterns in nature. (*p*) 2. Real existences: *i. e.*, objects existing without the mind, corresponding to ideas within it. (*q*)

6. 3<sup>o</sup>. With regard to intensity of persuasion; the

(*m*) Locke, bk. 4, ch. 1.

(*n*) *Id.* bk. 4, ch. 1, §§ 4, 5, 6.

(*o*) *Id.* bk. 4, ch. 4, § 6; De Morgan on Probabilities, p. 9.

(*p*) It must not, however, be supposed that mathematical truths have not, like all others, their ultimate basis in experience. As the highest authority, we subjoin the following from Sir Isaac Newton's Preface to his immortal work, "*Philosophiæ Naturalis Principia Mathematica.*" "*Linearum rectarum et circulorum descriptiones, in quibus Geometria fundatur, ad Mechanicam pertinent. Has lineas describere geometria non docet, sed postulat. Postulat enim ut tiro easdem accuratè describere*

*priùs didicerit, quàm limen attingat geometriæ; dein, quomodo per has operationes problemata solvantur, docet; rectas et circulos describere problemata sunt, sed non geometrica. Ex mechanica postuiatur horum solutio, in geometria docetur solutorum usus. Ac gloriatur geometria quòd tam paucis principiis aliundè petitis tam multa præstet. Fundatur igitur Geometria in praxi mechanica.*"

(*q*) Locke, bk. 4, ch. 1, § 7. Perhaps, in order to avoid prejudging a highly metaphysical question, we should say "objects existing, or appearing to our faculties to exist, without the mind, &c."

faculties of the human mind are comprehended in the genera, knowledge and judgment. (*r*) 1. By "knowledge," strictly speaking, is meant when we have an actual perception of the agreement or disagreement of any of our ideas; (*s*) and it is only to such a perception that the term "certainty" is properly applicable. (*t*) Knowledge is intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative, when it is only perceived mediately, *i.e.*, when it is deduced from a comparison of each, with intervening ideas which have a constant and immutable connection with them; as in the case of mathematical truths of which the mind has taken in the proofs. And, lastly, when, through the agency of our senses, we obtain a perception of the existence of external objects, our knowledge is said to be sensitive. (*u*) But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz., as synonymous with settled belief or reasonable conviction: as when we say that such a one received stolen goods, knowing them to have been stolen; or that we are certain, or morally certain, of the existence of such a fact, &c. (*x*)

7. 2. "Judgment," the other faculty of the mind, though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false

(*r*) Locke, bk. 4, ch. 14, § 4, and ch. 1, § 7.

(*s*) *Id.* bk. 4, ch. 1, § 2.

(*t*) *Id.* bk. 4, ch. 4, §§ 7, 18.

(*u*) *Id.* bk. 4, ch. 2 and 11.

(*x*) Pufendorf, *Jus Nat. et Gent.* lib. 1, c. 2, § 11; Butler's *Analogy of Religion*, Introduction.

by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so. (*y*) The foundation of this is the probability or likelihood of that agreement or disagreement, of that truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. (*z*) Judgment is often based on the testimony of others, vouching their observation or experience; (*a*) but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators.

8. Actual knowledge and certainty extending a comparatively little way, men are compelled to resort to judgment and to act on probability, in by far the greater number of their speculations, as well as in the transactions of life, both ordinary and extraordinary, trivial and important. (*b*) The faculty of judgment is conversant not only about matters of fact, which, falling under the observation of our senses, are capable of being proved by human testimony, but also about the operations of nature, and other things beyond the discovery of our senses; (*c*) and it thus embraces the enormous class of subjects investigated by analogy and induction. (*d*) But here it is important to remark, that on the same matter one man may have knowledge and certainty, while another has only judgment and probability; as when a man, either from ignorance of mathematical principles or

(*y*) Locke, bk. 4. ch. 15. § 1, and ch. 14, § 3.

(*z*) *Id.* ch. 15, §§ 3 and 4; ch. 14, s. 4; Butler's Analogy of Religion, Introduction.

(*a*) *Id.* ch. 15, § 4.

(*b*) *Id.* bk. 4, ch. 14, § 1; Butler's

Analogy of Religion, Introduction; 3 Bentham's Judicial Evidence, 351; Gilb. Ev. 3, 4, 4th Ed.

(*c*) *Id.* bk. 4, ch. 16, §§ 5 and 12.

(*d*) *Id.* § 12, and Bonnier, *Traité des Preuves*, §§ 9, *et seq.* 2d Ed.

laziness to go through the proofs, receives a mathematical truth on the testimony of one who comprehends it ; in this case he has only got moral evidence of that truth, while his informant has demonstrative proof. (*e*)

9. Another great distinction between knowledge and judgment remains to be pointed out. The former is, as we have seen, reducible to three kinds ; (*f*) but to classify the degrees of persuasion resulting from judgment is wholly beyond human power ; for the extent to which facts or propositions may be in conformity with our antecedent knowledge, observation, or experience, necessarily varies *ad infinitum*. An attempt has been made to express some of the shades of judgment by the terms assurance, confidence, confident belief, belief, conjecture, guess, doubt, wavering, distrust, disbelief, &c. (*g*)

10. The word PROOF seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition ; (*h*) and as truths differ, the proofs adapted to them differ also. (*i*) Thus the proofs of a mathematical problem or theorem, are the intermediate ideas which form the links in the chain of demonstration ; the proofs of anything established by induction, are the facts from which it is inferred, &c. ; and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents, and the like. Some authors use the terms "*factum probandum*" and "*factum probans*," to designate respectively the

(*e*) Locke, bk. 4. ch. 15, § 1 ; and ch. 14, § 3 ; 1 Greenl. Evid. § 1, note (1), 7th Ed.

(*f*) *Supra*, § 6.

(*g*) *Id.* bk. 4, ch. 16, §§ 6-9.

(*h*) Domat, *Les Loix Civiles dans leur Ordre Naturel*, part 1, liv. 3, tit. 6 ; Bonnier, *Traité des Preuves*, § 5 2d Ed.

(*i*) Doma. *in loc.* cit.

fact to be proved, and that by which it is proved. (*k*) "Proof" is also applied to the conviction generated in the mind by proof properly so called. (*l*)

II. The word EVIDENCE signifies, in its original sense, the state of being evident, *i.e.*, plain, apparent or notorious. (*m*) But by a beautiful and almost peculiar inflection of our language, (*n*) it is applied to that which tends to render evident or to generate proof. This is the sense in which it is commonly used in our law books, and will be used throughout this work. Evidence, thus understood, has been well defined,—any matter of fact, the effect, tendency, or design of which, is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. (*o*) The fact sought to be proved is termed the "principal fact:" the fact which tends to establish it, "the evidentiary fact." (*p*) When the chain consists of more than two parts, the intermediate links are principal facts with respect to those below, and evidentiary facts with respect to those above them. Such we propose to call "subalternate" principal and evidentiary facts.

(*k*) 3 Benth. Jud. Ev. 3; Wills, Circ. Ev. 15, 136, 137, 153, 3d Ed.

(*l*) Matthæus de Probationibus, c. 1, N. 1; Huberus, Prælectiones Juris Civilis, lib. 22, tit. 3, n. 2; 1 Greenl. Ev. § 1, 7th Ed.

(*m*) Johns. Dict. The Latin "evidentia," and the French "évidence," are commonly restricted by foreign jurists, to those cases where conviction is produced by the testimony of our senses: See Quintilian, Inst. Orat. lib. 6, c. 2; Calvin, Lexic. Jurid.; Steph. Thesaur. Ling. Lat.; Domat, Lois Civiles, part 1, liv. 3, tit. 6; Bonnier Traité des Preuves, §§ 6, 8, 9,

82, &c., 2nd Ed. All relating to evidence, as the term is used in English law, is treated of by the Civilians and Canonists under the head "probatio," and by the French writers under that of "preuve."

(*n*) It has the same meaning in Norman French; see int. al. T. 18 Edw. II, 614, tit. Replegg.; 9 Edw. III. 5, 6, pl. 11.

(*o*) 1 Benth. Jud. Ev. 17. "Evidence," Evidentia, signifies generally any proof, be it testimony of men, records or writings: Cowel's Interpreter; and Les Termes de la Ley, See Co. Litt. 283, a.

(*p*) 1 Benth. Jud. Ev. 18.

12. Confining ourselves henceforward to truths of fact—the proper object of the present treatise—we shall first direct attention to some divisions of them, which, as connected with jurisprudence especially, it will be convenient to bear in mind. In the first place, then, facts are either physical or psychological. (*g*) By “physical facts” are meant, such as either have their seat in some inanimate being, or if in one that is animate, then not by virtue of the qualities which constitute it such; while “psychological facts,” are those which have their seat in an animate being, by virtue of the qualities by which it is constituted animate. Thus, the existence of visible objects, the outward acts of intelligent agents, the *res gestæ* of a lawsuit, &c., range themselves under the former class; while to the latter belong such as only exist in the mind of an individual; as, for instance, the sensations or recollections of which he is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts, &c. Psychological facts are obviously incapable of direct proof by the testimony of witnesses—their existence can only be ascertained either by confession of the party whose mind is their seat—(*r*) “*index animi sermo*”—(*s*) or by presumptive inference from physical facts. (*t*)

13. There are two other divisions of facts which deserve to be noted. One is, that they are either events or states of things. (*u*) By an “event” is meant some motion or change, considered as having come about either in the course of nature, or through

(*g*) 1 Benth. Jud. Ev. 45

(*s*) 5 Co. 118 b.

(*r*) Mascardus de Probationibus,  
Concl. 309; 1 Benth. Jud. Ev. 82,  
145; 3 *Id.* 6.

(*t*) Mascard. de Prob. Concl. 94;  
1 Benth. Jud. Ev. 82, 145; 3 *Id.* 6.

(*u*) *Id.* 47.

the agency of human will ; in which latter case it is called "an act," or "an action." The fall of a tree is "an event," the existence of a tree is a "state of things ;" but both are alike "facts." (*x*) The remaining division of facts is into positive or affirmative, and negative : (*y*) a distinction which, unlike both the former, does not belong to the nature of the facts themselves, but to that of the discourse which we employ in speaking of them. (*z*) The existence of a certain state of things is a positive or affirmative fact, the non-existence of it is a negative fact. But the only really existing facts are positive ones—for a negative fact is nothing more than the non-existence of a positive fact ; and the non-existence of a negative fact, is equivalent to the existence of the correspondent and opposite positive fact. (*a*)

14. Our persuasion of the existence or non-existence of facts has its source, or efficient cause, either in the operation of our own perceptive or intellectual faculties, or in the operation of the like faculties on the part of others, evidenced to us either by discourse or deportment. The former of these may be called evidence *ab intrâ* ; the latter, evidence *ab extrâ*. (*b*) The immense part which evidence *ab extrâ* bears in forensic procedure, as well as in almost everything else, makes it advisable that we should consider, somewhat at large, the grounds of belief in human testimony, and the dangers to be avoided when dealing with it.

15. The existence of a strong tendency in the human mind, to accept as true what has been related by others is universally admitted, and is confirmed by every day's observation ; and it may be laid down as equally certain, that one cause of this tendency is our

(*x*) 1 Benth. Jud. Ev. 48 (*y*) *Id.* 49. (*z*) *Id.* (*a*) *Id.* 49, 50. (*b*) *Id.* 51 52



experience of the great preponderance of truth over falsehood, in human testimony taken as a whole. But whether this is the sole cause has given rise to difference of opinion. Writers on natural law describe man as endowed by nature with a sort of moral instinct, which prompts him to act in certain cases where vigor and expedition are required, and where the faculties of reason and reflection are either immatured, or, if matured, would be too slow; (*c*) and most authors think, that a tendency to believe the statements of others is to be found among the operations of this instinct. Man, they argue, is so constituted, that the knowledge which he can acquire through his personal experience is necessarily very limited, and, unless by some effective provision of nature he were enabled, and indeed compelled, to avail himself of the knowledge and experience of others, the world could neither be governed nor improved. The instinctive character of the tendency in question, they say, appears from the undoubted fact that it is immeasurably strongest in childhood, and diminishes when experience has made us acquainted with falsehood and deception. (*d*) Others, however, deny all this: (*e*) and it has been urged that the implicit belief so observable in children, is owing to their experience being all, or nearly all, on one side—namely, in favor of the truth of what they hear. (*f*)

16. However this may be, it is certain that the enunciation of truth and eloignment of willful falsehood, among men in their intercourse with each other, are secured by three guarantees or sanctions—the natural sanction, the moral or popular sanction

(*c*) Burlamaqui, *Principes du Droit de la Nature et des Gens*, pt. 2, ch. 3.

(*d*) 1 Greenl. Ev. § 7, 7th Ed., and the authorities there cited.

(*e*) 1 Benth. Jud. Ev. 127-130  
Paley's *Moral and Political Philosophy*, bk. 1, ch. 5.

(*f*) *Id.* 129, 130.

and the religious sanction. (*g*) And first, of the natural sanction. Mutual confidence between man and man being indispensable to the acquisition of knowledge, the happiness of our race, and, indeed, to the very existence of society, the great Creator has planted the springs of truth very deep in the human breast. According to Bentham, the natural sanction is altogether physical in its character, arising out of the love of ease,—memory being prompter than invention. (*h*) “To relate incidents as they have really happened,” he says, (*i*) “is the work of the memory: to relate them otherwise than as they have really happened, is the work of the invention. But, generally speaking, comparing the work of the memory with that of the invention, the latter will be found by much the harder work. The ideas presented by the memory present themselves in the first instance, and as it were of their own accord: the ideas presented by the invention, by the imagination, do not present themselves without labor and exertion. In the first instance come the true facts presented by the memory, which facts must be put aside: they are constantly presenting themselves, and as constantly must the door be shut against them. The false facts, for which the imagination is drawn upon, are not to be got at without effort; not only so, but if, in the search made after them, any at all present themselves, different ones will present themselves for the same place: to the labor of investigation is thus added the

(*g*) 1 Benth. Jud. Ev. 198; 5 *Id.* 635, 636. See Bonnier, *Traité des Preuves*, §§ 220, 221, 222, 2d Ed. For the reasons stated in the text, we have adopted the phrase “natural sanction,” used by Bonnier, in preference to “physical sanction” used by Bentham. The legal or political sanction of truth,

and oaths, which are only an application of the religious sanction, being both artificial in their nature, will be more properly considered in the next Part.

(*h*) 2 *Id.* 2.

(*i*) 1 *Id.* 202, 203. See also 1 Stark. Ev. 14, 3d Ed. & *Id.* 20, 4th Ed.

labor of selection." It is, however, very doubtful whether this, although true as far as it goes, embraces the full extent of the natural sanction. Bonnier, in his *Traité des Preuves*, (*k*) severely attacks the passages just quoted, and says that the natural sanction for the veracity of witnesses, is to be found in a certain powerful feeling in the human mind, which impels man to speak the truth, and makes him do violence to himself whenever he betrays it; that the true and the just are two poles toward which the human mind, when uncorrupted, continually points. And somewhat similar language is used by Lord Bacon. (*l*) In another part of the same work, however, (*m*) Bentham mentions the sympathetic sanction as a branch of the natural one, describing it to be the feeling by which we are deterred from falsehood, by regret for the pain and injury which it may cause others. He also considers the imperfection of the natural sanction, to consist in its being better calculated to prevent falsehood in toto, than to secure circumstantial truth in particulars; (*n*) which, taking his definition of that sanction, is no doubt the case.

17. The moral sanction may be described in a word. Men having found the advantages of truth and the inconveniences of falsehood in their mutual intercourse, and, perhaps, being further actuated by the reflection, that truth is in conformity with the will of God and the laws of nature, have by general consent affixed the brand of disgrace on a voluntary departure from it; and hence, as observed by several

(*k*) § 221, 2d Ed. In another place, § 12, 2d Ed., he says, "S'il y a une tendance naturelle des esprits vers le vrai, comme des corps vers le centre de la terre, l'homme, étant libre, peut obéir ou ne pas obéir à cette tendance, et il

n'arrive que trop souvent que ses déclarations soient mensongères."

(*l*) *Essay on Truth*.

(*m*) 5 Benth. Jud. Ev. 636.

(*n*) 1 *Id.* 207, 208.

authors, the infamy attached to the word "liar." (*o*) A great infirmity of the moral sanction is, that deriving, as it does, all its force from the value men set on the opinions of others, it naturally teaches them to conceal their own faults from public view, even at the sacrifice of truth. (*p*)

18. Lastly, there is the religious sanction; which is founded on the belief that truth is acceptable, and falsehood abhorrent to the Governor of the Universe, and that He will, in some way, reward the one and punish the other. All forms of religious belief acknowledge this great principle; and the following argument, among others, has been used to show that it is a precept of natural religion. "We are so constituted, that obedience to the law of veracity is absolutely necessary to our happiness. Were we to lose either our feeling of obligation to tell the truth, or our disposition to receive as truth whatever is told to us, there would at once be an end to all science and all knowledge, beyond that which every man had obtained by his own personal observation and experience. No man could profit by the discoveries of his contemporaries, much less by the discoveries of those men who have gone before him. Language would be useless, and we should be but little removed from the brutes. Every one must be aware, upon the slightest reflection, that a community of entire liars could not exist in a state of society. The effects of such a course of conduct upon the whole, show us what is the will of God in the individual case." (*q*) The divine punishment for falsehood being prospective and

(*o*) See Pufendorf, *Jus Nat. et Gent.* lib. 4, cap. 1, § 8; Benth. *Jud. Ev.* bk. 1, ch. 11, sect. 5, and Lord Bacon's *Essay on Truth*.

(*p*) 1 Benth. *Jud. Ev.* 212-216.

(*q*) Wayland's *Elements of Moral Science*, p. 272, London. See also a paper by Addison, in the "*Spectator*" No. 507.

invisible, detracts much from the weight of this sanction ; and perjury is often committed by persons whose religious faith can not be doubted, but who presumptuously hope, either by their subsequent good conduct or some other means, to efface its guilt in the eyes of Heaven.

19. The effect of these three sanctions is much greater than might at first sight be supposed. They are in continual operation as efficient causes for the production of truth, and rendering its enunciation natural and habitual to men ; while every incentive to falsehood can only be looked upon as a species of disturbing force, which acts occasionally and exceptionally. Of few persons indeed can it be said, that their adherence to truth is undeviating at all times ; with many its observance appears to depend on circumstance, accident, or caprice ; with some the practice of lying seems inveterate ; while certain classes of persons systematically, and as it were on principle, withhold the truth from other classes on particular subjects. But after every abatement has been made for aberrations, the quantity of truth daily spoken immeasurably exceeds that of falsehood ; (r) and Bentham even goes so far as to assert, that “from the mouth of the most egregious liar that ever existed, truth must have issued at least a hundred times for once that willful falsehood has taken its place.” (s)

20. It is, however, of the utmost importance to observe, that any of those springs of action which we

(r) Bonnier, *Traité des Preuves*, § 15, 2nd Ed.

(s) 5 Benth. Jud. Ev. 82. We have read somewhere of a country, the inhabitants of which purposely and systematically gave false answers to all questions respecting its topography.

Still a traveler was enabled to obtain the information he wished for respecting it, by questioning them upon incidental and collateral facts, when the truth, naturally oozing out, supplied him with materials for arriving at the knowledge sought.

have denominated "sanctions of truth," may be found on the wrong side, *i.e.*, producing falsehood instead of truth. If the natural sanction rests solely on a love of ease, that love, while it represses the invention of false facts, equally prevents the taxing the memory to give a perfect narrative of what has been witnessed; and if supposed to spring from a love of truth and justice, the party called on to give evidence may consider the ends of justice advanced by withholding the truth; as, for instance, where the disclosing it will induce the condemnation of a criminal whose prosecution, though strictly legal, he deems morally unjust, or whose future good behavior he thinks will be better ensured by escape than by punishment. But of the sanctions in question, none is so frequently divided against itself as the moral. Conduct condemned by one portion of society is often applauded by the rest, and persons desirous of the good opinion of certain classes, are often satisfied to attain it at the cost of sinking themselves in that of others, and tell or suppress the truth as may best advance that object. "The credibility of a witness," says the Marquis Beccaria, (1) "may be in some degree lessened when he is member of some private society, whose usages and maxims are either not well known, or different from those of the public. Such a man has not only his own passions, but those of other people." Even the religious sanction has been enlisted in the cause of falsehood. Particular forms of religion allow it in certain cases; (2) and the truth

(1) "La credibilità di un testimonio può essere alcune volte sminuita quando egli sia membro di alcuna società privata, di cui gli usi e le massime sieno o non ben conosciute, o diverse dalle pubbliche. Un tal

nomo ha non solo le proprie, ma le altrui passioni."—Beccaria, Dei Delitti e delle Pene, § 8.

(2) See Halhed's Code of Gentoo Laws, &c., cited *infra*, bk. 2, pt. 1, ch. 2. Whether a violation of truth is

has often been sacrificed by religious persons in order to avoid bringing scandal on their creeds.

21. The credit due to human testimony, assuming that we correctly understand the language employed, is the compound ratio of the witness's means of acquaintance with what he narrates, and of his intention to narrate it truly. (*x*) In estimating the latter, three things are to be attended to. 1. Whether he labors under any interest or bias, which may sway him to pervert the truth. 2. His veracity on former occasions—evidenced either by our own experience or credible truth. 3. His manner and deportment in delivering his testimony. “*Interrogabit judex,*” says one of the canonists, (*y*) “*testes in quâlibet causâ, eosque diligenter examinabit, de singulis circumstantiis diligenter inquirans, de causis videlicet, de personis, loco, tempore, visu, auditu, scientiâ, credulitate, famâ, et certitudine, cæterisque, quæ ad rem facere, et negotio convenire existimabit. Illud quoque subtiliter animadvertere non omittet, quo vultu, quâ constantiâ, quâve animi trepidatione testes deponant; cùm interdum ex his, vel ipsis invitis testibus, magis quàm ex verborum serie rerum veritas elucescat.*” “A consideration of the pemeanor of the witness upon the trial,” says one of our books, (*z*) “and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself. An overforward and hasty zeal on

allowable in any, and if so, in what cases, has been much considered by moralists and divines. See Puffendorf, *Jus Natur. et Gent. lib. 4, cap. 1, §§ 7 et seq.* Bentham's *Jud. Ev. bk. 1, ch. 11, sec. 5*; Paley's *Moral and Political Philosophy, bk. 3, pt. 1, ch. 15, &c.*; and *bk. 1, ch. 5*. It is, however, universally agreed, that the obli-

gation to tell truth is the rule; the license to falsehood, if such exists, the exception.

(*x*) See *infra*, § 73, and notes.

(*y*) Lancelottus, *Institutiones Juris Canonici, lib. 3, tit. 14, §§ 11, 12.*

(*z*) 1 Stark. *Ev.* 547, 3d Ed.; *Id.* 822, 823, 4th Ed.

the part of the witness, in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question, for the purpose of gaining time to consider the effect of his answer ; precipitancy in answering, without waiting to hear or to understand the nature of the question ; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible ; an affectation of indifference ; are all to a greater or less extent obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity." This, however, must be taken with some qualification. "A witness," says a modern writer, (a) "may be very honest, although his demeanor is, in some respects, open to censure, and deserves rebuke. Constitution of mind, habit, manner of life, may give him a coarse, blunt tongue, and a manner in appearance, yet not meant to be, uncivil or disrespectful. Such a rough, unrefined nature or carriage may well consist with a habit of speaking the truth, with an abhorrence of falsehood, and a wish and determination to give true evidence. . . . Demeanor consisting in confusion, embarrassment, hesitation in replying to questions, and even

(a) Ram on facts, pp. 183-184.



vacillating or contradictory answers, are not necessarily a proof of dishonesty in a witness, because this deportment may arise from bashfulness, or timidity, and may be the natural and inevitable effect of an examination by a skillful, practiced, perhaps unscrupulous advocate whose aim in his questions is, to entangle, entrap, and stupefy the witness, and cause him to say and unsay anything or everything. It may not be good behavior in a witness, to suffer his eyes to wander about the court while he is under examination, but this conduct may not be unnatural in the midst perhaps of an entirely new scene to him ; and the distraction of mind occasioned by that employment of his eyes may well cause him, on returning to his duty, to answer hastily, and without consideration. But in all this there may be no intentional disrespect to the court ; and the witness, notwithstanding, may be a very honest one. Again, it happens to all persons occasionally, without thought to use one word for another, making the sense very different from what was intended : unconsciously we say that we did not mean to say. In like manner, a witness may inadvertently contradict himself."

22. The capacity of a party to give a faithful account of things depends on—1. The opportunities he has had of observing the matters he narrates. 2. His powers, either natural or acquired, of perception and observation ; and here it is important to ascertain whether he is a discreet, sober-minded person, or imaginative and imbued with a love of the marvelous, and also whether he lies under any bias likely to distort his judgment. 3. Whether the circumstances he narrates were likely to attract his attention, in consequence of their importance, either intrinsically or with relation to himself. " Where the chem-

ist and the physician see a dangerous poison, the kitchen-maid may see nothing more than an immaterial flaw in one of her pans, the cook may behold an innocent means of recommending herself to the palate through the medium of the eye. Where the botanist sees a rare, and perhaps new, plant, the husbandman sees a weed: where the mineralogist sees a new ore, pregnant with some new metal, the laborer sees a lump of dirt, not distinguishable from the rest, unless it be by being heavier and more troublesome."

(*b*) 4. His memory; and here, whether the transaction is ancient or recent, whether his recollection has been refreshed by memorandum, conversation, &c.

23. The probative force arising from concurrent testimonies, is the compound result of the probabilities of the testimonies taken singly. (*c*) But when testimonies conflict or clash with each other, we must form the best conclusion we can as to their relative values.

24. There are two things which must never be lost sight of when weighing testimony of any kind. 1. The consistency of the different parts of the narration. 2. The possibility or probability, the impossibility or improbability, of the matters related,—which afford a sort of corroborative or counter-evidence of those matters. By probability, as already observed, (*d*) is meant the likelihood of anything to be true, deduced from its conformity to our knowledge, observation, and experience. When a supposed fact is so repugnant to the laws of nature, assumed for this purpose to be fixed and immutable, (*e*) that no

(*b*) 1 Benth. Jud. Ev. 164-5.

(*c*) See *infra*, § 73, and notes.

(*d*) *Supra*, § 7.

(*e*) The judicial proceedings of modern times, are conducted on the assumption that the laws of nature are

amount of evidence could induce us to believe it, such supposed fact is said to be impossible, or physically impossible. There is likewise moral impossibility, which, however, is nothing more than a high degree of improbability.

25. As the knowledge, observation, and experience of men vary in every imaginable degree, their notions of possibility and probability might naturally be expected to differ; and we continually find that, not only are the most opposite judgments formed as to the credence due to alleged facts, but that a fact which one man considers both possible and probable, another holds to be physically impossible. (*f*) With respect to this kind of impossibility, our notions will be more or less accurate according to our acquaintance with the laws of nature; for many phenomena in apparent violation of her laws have been found, on examination, to be the regular consequences of others previously unknown. The story of the king of Siam has often been quoted, who believed everything the Dutch ambassador told him about Europe, until he mentioned that the water there in winter became so hard that men, horses, and even an elephant, could walk on it, which that monarch at once pronounced a palpable falsehood. (*g*) About three centuries and a half ago, when Columbus declared his conviction that the East Indies could be reached by sailing westward, and offered to make the trial, the learned world

fixed and immutable; not from disbelief in miraculous interposition, but because such interposition is unquestionably rare, and it would be dangerous in the highest degree, if tribunals were allowed to adopt its supposed occurrence as a principle of decision.

(*f*) He may even know it to be so.

*e.g.*—A plausible but fallacious chain of presumptive evidence tends to indicate A. as the person who committed a crime at B. His guilt may seem probable to C.; but D., E., and F. know that it is impossible; for at the moment the crime was perpetrated, they were at G., and saw A. there.

(*g*) Locke, bk. 4, ch. 15, § 5.

was prepared to demonstrate its physical impossibility ; (h) while similar language has, in our own day, been applied to the project for effecting the passage of the Atlantic Ocean by steam. So the assertion that England could be crossed in a carriage traveling at the rate of sixty miles an hour ; or that a message could, with the speed of lightning, be transmitted through many miles of sea, at the depth of twenty or thirty fathoms, would, for many ages past, by the great bulk of mankind at least, have been pronounced a lie too gross to require confutation ; and the bare suggestion that a message might be transmitted in like manner from one shore of the Atlantic to the other, would either have consigned a man to confinement as a hopeless lunatic, or sent him to the stake as an emissary of the powers of darkness. And, lastly, different persons may consider the same thing possible, or even probable, for very opposite reasons. In the infancy of aërostation, when its attempts were watched with anxiety by the learned, and ridicule by the ignorant, some Japanese, on seeing a balloon ascend at St. Petersburg, expressed no surprise whatever ; and being asked the cause of their unconcern, said it was nothing but magic, and in Japan they had practitioners in magic in abundance. (z)

26. Before dismissing this subject, it is to be observed that falsehood in human testimony presents itself much more frequently in the shape of misrepresentation, incompleteness, or exaggeration, than of

(h) See the Life of Columbus, by Washington Irving, vol. i. bk. 2, ch. 4. A curious fac-simile of the map of the world, as during the middle ages it was supposed to exist, is given in Miller's Testimony of the Rocks, p. 363.

(z) 3 Benth. Jud. Ev. 315. The Chapter on Improbability and Impossibility in Bentham's work on Judicial Evidence—bk. 5, ch. 16—though an unfinished sketch, and by no means free from error, will repay perusal.

total fabrication. (*j*) “Qui non libere veritatem pronunciat, proditor veritatis est.” (*k*) A lie is never half so dangerous as when it is woven up with some indisputable verity; and hence the use of the comprehensive form of oath administered in English courts of justice, that the deposing witness is to tell “the truth, the whole truth, and nothing but the truth.” So, an extensive field of mischief is opened by mere exaggeration; for “as truth is made the groundwork of the picture, and fiction lends but light and shade, it often requires more patience and acuteness than most men possess, or are willing to exercise, to distinguish fact from fancy, and to repaint the narrative in its proper colors. In short, the intermixture of truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent.” (*l*)

27. There are several divisions of evidence which although in some degree arbitrary, it will be found useful to bear in mind. In the first place, then, evidence is either direct or indirect; according as the principal fact follows from the evidentiary,—the *factum probandum* from the *factum probans*—immediately or by inference. (*m*) In jurisprudence, however, direct

(*j*) This is particularly the case when words are repeated. “Il tuomo, il gesto, tutte cio che precede e cio che siegue, le differenti idee che gli uomini attaccano alle stesse parole, alterano e modificano in maniera i detti di un’ uomo, che e quasi impossibile il reprerle quali precisamente furono dette. Di piu, le azioni violente, e fuori dell’ uso ordinario, quali sono i veri delitti, lasciano traccia di se nella moltitudine delle circostanze, e negli effetti che ne derivano, &c.: ma le parole non rimangono che nella memoria, per lo piu infedele, e spesso sedotta, degli ascoltanti. Egli e adunque di gran

lunga piu facile una calunnia sulle parole che sulle azioni di un uomo.”—Beccaria, *Dei Delitti e delle Pene*, § 8.

(*k*) 11 Co. 83 a; 4 Inst. Epil.

(*l*) Tayl. Evid. § 46, 5th Ed., and Lectures there cited

(*m*) “Prima quidem illa partitio ab Aristotele tradita, consensum fere omnium meruit, alias esse probationes quas extra dicendi rationem acciperet orator; alias quas ex causa traheret ipse, et quodammodo gigneret. Ideoque illas ἀτέχνους, id est inartificiales has ἐντέχνους, id est artificiales vocaverunt:” Quintil. Inst. Orat.

evidence is commonly used in a secondary sense, viz. as limited to cases where the principal fact, or *factum probandum*, is attested directly by witnesses, things or documents. (*n*) Indirect evidence, known in forensic procedure by the name of "circumstantial evidence," (*o*) is either conclusive or presumptive; conclusive, where the connection between the principal and evidentiary facts—the *factum probandum* and *factum probans*—is a necessary consequence of the laws of nature; presumptive, where it only rests on a greater or less degree of probability. (*p*) In practice this latter is termed "presumptive evidence;" obviously a secondary sense of the word: for direct evidence is in truth only presumptive, seeing that it rests on a presumption of the accuracy and veracity of witnesses, things or documents. (*q*)

28. Again evidence is either real or personal. (*r*) By real evidence is meant evidence of which any object belonging to the class of things is the source, persons also being included, in respect of such properties as belong to them in common with things. (*s*) This sort of

lib. 5, c. 1. See also Heinec. ad Pand. pars 4, § 116.

(*n*) "Omnis nostra probatio aut directa est aut obliqua. Directa, cum id quod probare volumus ipsis tabulis aut testimoniis continetur. Obliqua, cum id quod intendimus ex tabulis aut testimoniis argumentando colligitur." Vinnius, Jurispr. Contract. lib. 4, c. 25. See also Stark. Evidence, 15, 3rd Ed.; and Id. 21, 4th Ed.

(*o*) It may be doubted whether these terms are, strictly speaking, synonymous. Circumstantial evidence is that species of indirect evidence, which municipal law deems sufficiently proximate to form the basis of judicial decision. Where, for instance, philo-

sophical or historical truths are established by remote inference or analogy from facts, the evidence of those truths is indirect, but can scarcely be called circumstantial.

(*p*) "Dividuntur (signa) in has primas duas species, quod eorum alia sunt quæ necessaria sunt, quæ Græci vocant *τεκμήρια*; alia non necessaria, quæ *σημεία*. Priora illa sunt quæ aliter habere se non possunt. Alia sunt signa non necessaria, quæ *εἰκότα* Græci vocant." Quintil. Inst. Orat. lib. 5, c. 9. Some editions have *εἰκαστα* instead of *εἰκότα*.

(*q*) Supra, § 7.

(*r*) 1 Benth. Jud. Ev. 53.

(*s*) 3 Benth. Jud. Ev. 26; and 1 Id.

evidence may be either immediate, where the thing comes under the cognizance of our senses ; or reported, where its existence is related to us by others. Personal evidence is that which is afforded by a human agent ; either in the way of discourse, or by voluntary signs. Evidence supplied by observation of involuntary changes of countenance and deportment, comes under the head of real evidence. (*t*)

29. The next division of evidence deserves particular attention, both for its own sake, and because it will be found to run through the whole system of English forensic procedure. (*u*) It is this, that all evidence is either original or unoriginal. By original evidence is meant evidence, either *ab intra* or *ab extra*, which has an independent probative force of its own ; unoriginal, also called derivative, transmitted or secondhand evidence, is that which derives its force from, through, or under, some other. And of this derivative evidence there are five forms. 1. When supposed oral evidence is delivered through oral ; this is hearsay evidence, in the strict and primary sense of the term. 2. When supposed written evidence is delivered through written. 3. When supposed oral evidence is delivered through written. 4. When supposed written evidence is delivered through oral. 5. When real evidence is reported, either by word of mouth or otherwise. (*x*)

30. The infirmity of derivative evidence as compared with its primary source will be apparent on the slightest reflection. Take the most obvious case,—supposed oral evidence delivered through oral. A. deposes

53. This is the “*evidentia rei vel facti*” of the civilians. Mascard. de Prob. Quæst. 8 ; Calv. Lexic. Jurid. ; 1 Hagg. Cons. Rep. 105. See *infra*, bk. 2, pt. 2.

(*t*) We have slightly deviated from

the definition given in 1 Benth. Jud. Ev. 53, 54.

(*u*) See bk. 1, pt. 1, and bk. 3, pt. 2, ch. 3 and 4.

(*x*) See 3 Benth. Jud. Ev. 396.

that B. told him that he witnessed a certain fact. If B. were the deposing witness there would be only two chances of error in believing his testimony : viz. that he may have been mistaken as to what he thought he witnessed ; or, that his narrative may be intentionally false. But when his testimony comes to us obstetricante manu, (*y*) through the relation of A., two fresh chances of error are introduced : viz. that A. may have either mistaken the words uttered by B., or may intend to misrepresent them. There is indeed an additional, although weak, chance of obtaining the truth through double falsehood or mistake. *E. g.*, the question is was X. at a certain time at a certain place. A. was there and saw him ; but intending to deceive B., tells him he was not. B. believes this ; but with the intention of deceiving, says to C., that A. told him that X., was there. In relying on this supposed statement of A., vouched by B., C. has got the truth. (*z*) It is perhaps superfluous to add that the danger increases, the greater the number of media through which evidence has come ; for with each additional witness, or other medium, two fresh chances of error are introduced. (*a*)

**31.** We shall notice one other division, the value of which has been too much overlooked. Evidence is either pre-appointed, (*b*) otherwise called pre-constituted, (*c*) or casual. (*d*) Pre-appointed evidence is

(*y*) This expression is to be found in the Vulgate, Job, xxvi. 13 : " Spiritus ejus ornavit cœlos, & obstetricante manu ejus eductus est coluber tortuosus." See also Exod. i. 16 : " Quando obstetricabitis Hebræas, &c."

(*z*) See Lacroix, Calcul des Probabilités, § 142.

(*a*) For the proof of historical facts

by derivative evidence, see the second Part of this Introduction.

(*b*) " Pre-appointed evidence." 1 Benth. Jud. Ev. 256 ; Id. 435.

(*c*) " Preuves Preconstituées," Bonnier, Traite des Preuves, §§ 97 and 379, 2nd Ed. ; and part 2. liv. 2.

(*d*) " Casual Evidence." Bentham's Rationale of Evidence, &c., App. A., ch. 8.



defined by Bentham, in one place, (*e*) to be where "the creation or preservation of an article of evidence has been, either to public or private minds, an object of solicitude, and thence a final cause of arrangement taken in consequence (viz. in the view of its serving to give effect to a right, or enforce an obligation, on some future contingent occasion) ; the evidence so-created and preserved comes under the notion of pre-appointed evidence." In another place (*f*) he speaks of it as written evidence, created with the design of being employed on the occasion and for the purpose of some suit, or cause, not individually determined. Under this head come public documents : such as records, registers, &c. : together with deeds, wills, contracts and other instruments for the facilitating of proof on future occasions ; which are drawn up by individuals either in compliance with the positive requirements of law, or with a view to the convenience of themselves or others. But it is a mistake to assume that this kind of evidence must necessarily be in a written form. (*g*) When a party about to do a deliberate act calls particular persons to witness, in order that they may be able to bear testimony to it on future occasions, their evidence is pre-appointed or pre-constituted, as much as a deed which professes to be made in witness of the matters which it contains. There are several instances in the Anglo-Saxon laws, where sales were required to be made in the presence of particular classes of persons, or in particular places. (*h*) A nuncupative will under the 29 Car. 2, c. 3, s. 19, was not good unless the testator "bid the persons present, or some of them, bear witness that such was his will, &c.;" (*i*) and the 2 &

(*e*) 2 Benth. Jud. Ev. 435.

(*f*) 1 Id. 56.

(*g*) See Bonnier, *Traite des Preuves* §§ 379, 380, 2nd Ed.

(*h*) See those collected in 1 Greenl. Ev. § 262, note (4), 7th Ed.

(*i*) See now 7 Will. 4 & 1 Vict. c. 26, s. 11.

3 Will. 4, c. 75, s. 8, enacts, that any person may "either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, direct that his body after death be examined anatomically, &c." (*k*) Any evidence not coming under the head of "pre-appointed evidence" may be denominated "casual evidence." (*l*)

(*k*) The direction given in Matt. xviii. 15, 16, seems a clear case of unwritten pre-appointed evidence: "If thy brother shall trespass against thee, go and tell him his fault, &c. But if he will not hear thee, then take with

thee one or two more, that in the mouth of two or three witnesses every word may be established." See also Genesis, xxiii. 17, 18.

(*l*) "Casual Evidence." Bentham's Rat. of Ev., &c., App. A., ch. 8.

## PART II.

## JUDICIAL EVIDENCE.

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32. Having considered the subject of evidence apart from jurisprudence and judicature, for the sake of distinction termed "natural" or "moral evidence," we proceed to that of "JUDICIAL EVIDENCE," which is a species of the former, with the view of showing its essential difference and characteristics.

33. "Judicial evidence" may be defined, the evidence received by courts of justice in proof or disproof of facts, the existence of which comes in question before them. By facts here must be understood the *res gestæ* of some suit, or other matter, to which, when ascertained, the law is to be applied; for although, in logical accuracy, the existence or non-existence of a law is a question of fact, it is rarely spoken of as such, either by jurists or practitioners. (a)<sup>1</sup> By "law" here, we mean the general law of

(a) Voet. ad Pand. lib. 22, tit. 3, n. 8; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 7; Vinnius, Jurispr. Contr. lib. 4, cap. 25; Bonnier, Traité des Preuves, §§ 2 and 23, 2nd Ed. See also Co. Litt. 283 a; 1 Stark Ev. 9, 3rd Ed., and 12, 4th Ed.

<sup>1</sup> Fact is anything which is the subject of testimony. "The facts which the Code (of N. Y.) requires to be set forth," said Duer, J. (in *Lawrence v. Wright*, 2 Duer 673) "are not true propositions but physical facts, capable as such of being established by evidence . . . and from which, when so established—the right to maintain the action, or the validity of a defense is a necessary conclusion of law—a conclusion which the court will draw, and which it is quite unnecessary

each country, which its tribunals are bound to know without proof; for they are not bound, at least in general, to take judicial cognizance of local customs, (b) or the laws of foreign nations (c)—the existence of both must be proved as facts. (d)<sup>2</sup>

(b) Heinec. ad Pand. pars 4, § 119; seq., 5th Ed.; Ph. and Am. Ev, 624, Id.; pars 1, § 103, Co. Litt. 115 b, Tayl. Ev. § 5, 5th Ed.  
175 b; Tayl. Ev. § 5, 5th Ed.

(d) See *Clegg v. Levy*, 5 Camp.

(c) *Story, Conf. Laws*, § 637, et 166; *Miller v. Heinrich*, 4 Id. 154.

that the pleader should state.”—See *Mann v. Morewood*, 5 Sandf. (N. Y.) 566.

The difference between questions of law and questions of fact is not easy to indicate. Thus, the intent with which a person did an act is, under certain circumstances, a question of fact, and under others, a question of legal inference; see *Moss v. Riddle*, 5 Cranch, 351; *Ballard v. Lockwood*, 1 Daly, 164; *Cleft v. White*, 12 N. Y. 538; *Miller v. People*, 5 Barb. 203, *Griffin v. Cranston*, 1 Bosw. (N. Y.) 281; *Seymour v. Wilson*, 14 N. Y. 567; *Griffin v. Marquardt*, 21 N. Y. 121; *Thurston v. Cornell*, 38 N. Y. 287; *Parker Mills v. Jacot*, 161.

Matter of opinion and matter of fact are often confounded. *Haight v. Hayt*, 19 N. Y. 464. Matter of pure opinion, when before a court, becomes matter of law; see *Jenning v. Carter*, 2 Wend. (N. Y.) 446; *Lockwood v. Thorn*, 11. N. Y. 170; *Farmers' Bank v. Vail*, 21 N. Y. 487, *Gage v. Parker*, 25 Barb. 141; *Cayuga Co. Bank v. Warden*, 6 N. Y. 29; *Dale v. Gold*, 2 Barb. N. Y. 490; *Buckley v. Keteltas*, 1 Hilt, 45. In *Cowell v. Hill*, 6 (N. Y.) 381, it was held that whether one had “wrongfully converted” property was a question of fact. *Decker v. Matthews*, 13 Id. 354; but see *Ensign v. Sherman*, 13 How Pr. N. S. 37; *Fletcher v. Calthorp*, 1 New Mag. Cas. 541. And so reasonable diligence (*Clark v. Owens*, 18 N. Y. 435), ordinary care (*Ayman v. Astor*, 6 Cow. 267) that a vessel was not engaged in any illicit trade (*Ocean Ins. Co. v. Francis*, 2 Wend. 72), have been held to be questions of fact.

<sup>2</sup> In the absence of all evidence, the laws of a foreign country are presumed to be the same as here, but where a difference alleged, the law must be proved as a fact. *Kilgore v. Buckley*, 14 Conn. 362; and see *Isabella v. Pecot*, 2 La. An. 387; *nney v. Hosea*, 3 Har. 77; *Hite v. Lenhart*, 7 Miss. 22; *Leak Elliot*, 4 Id. 446; *Comparet v. Jernegan*, 5 Blackf. 375;

34. Judicial evidence, as already observed, is a species of the genus "evidence"; and is for the most part nothing more than natural evidence, restrained or modified by rules of positive law. (*e*) Some of these rules are of an exclusionary nature, and reject as legal evidence, facts in themselves entitled to consideration. Others again are what may be called investigative, *i.e.*, investing natural evidence with an artificial weight; and even, in some instances, attributing the property of evidence to that which, abstractly speaking, has no probative force at all.

(*e*) "Probatio est actus judicialis, quo de facto dubio fides fit judici." Heinec. ad Pand. pars 4, § 115. "Probatio est intentionis nostræ legitima fides, quam judici facit aut actor, aut reus." Matth. de Prob. c. 1, n. 1; See also Voet. ad Pand. lib. 22, tit. 3, n. 1. "Probatio est ostensio rei dubiæ per legitimos modos judici faciendâ, in causis apud ipsum judicem controversis, &c. Nec in definitione omisi 'per legitimos modos,' hac de causa, quia multi sunt modi, ex quibus fit

probatio, ut per testes, per instrumenta, per evidentiam facti, per justam præsumptionem, per conjecturam, et per multos alios modos, &c. Ea enim ratione dixi legitimos, ut ostenderem hujusmodi probationes juxta legis normam debere fieri in hujusmodi probationibus observatum, hoc est secundum formam libelli, secundum quam pronuntiandum est ex allegatis:" Mascardus de Prob. Quæst. 2, n. 17, 21, 22, 23.

Union Bank v. Freeman, 3 Rob. (La.) 485; Bright v. White, 8 Miss 421; Goodwin v. Appleton, 9 Shep. (Me.) 453; Baughan v. Graham, 1 How. (Miss.) 220; Wakeman v. Marquand, 5 Martins New Series 270; Smoot v. Russel, 1 Id. 522; Smoot v. Baldwin, Id. 529; Campbell v. Miller, 3 Id. 149; Taylor v. Bank of Alexandria, 5 Leigh 471; Hanrick v. Andrews, 9 Port. 576; Owen v. Boyle, 3 Shep. 147; Young v. Bank of Alexandria, 4 Cranch, 388; Bailey v. McDowell, 2 Har. 34; Lord v. Staples, 3 Fost. 448; State v. Twitty, 2 Hawks, 441; Hosford v. Nichols, 1 Paige, 220; Coit v. Williken, 1 Den. 376; Strother v. Lucas, 6 Pet. 273; Ocean Ins. Co. v. Francis, 2 Wend 64; Henthorn v. Doe, 1 Blackf. 157; Allen v. Dunham, 1 Iowa (Green) 89; Hueston v. Jones, 2 La. An. 937; Lucas v. Peters, 6 Pet. 673; Wilson v. Smith, 5 Yerg. 379; Taylor v. Swett, 3 La. An. 36; U. S. v. Johnson, 4 Dall. 415; 1 Id. 9; Packard v. Hill, 2 Wend. 411, 3 Id. 173; Lincoln v. Battelle, 6 Id. 475.

35. And here the question presents itself, whence the necessity, whence the utility of such rules? Doubtful and disputed facts, it may be said, forming the subject-matter about which natural and judicial evidence are alike conversant, and truth being ever one and the same, must not any rules shackling the minds of tribunals in its investigation be a useless, if not mischievous, adjunct to laws? On examination, however, it will appear that a system of judicial proof is not only highly salutary and useful, but that an absolute necessity for it arises out of the very nature of municipal law, and the functions of tribunals, and that some such system is to be found among the legal institutions of every country,—we think we may say without a single exception.

36. The evidence adduced in courts of justice, being as it were a handmaid to jurisprudence, might reasonably be expected to partake of the nature and follow the law of the science to which it is ancillary. And this impression is confirmed, not removed, by a closer examination of the subject; for it will be found that the same reasons which give birth to municipal law itself, show the necessity for some authoritative regulation of the proofs resorted to in its administration. But in order to set this in a clear light, we must point attention to a distinction often overlooked, and the losing sight of which has been the source of much mistake and confusion. According to writers on natural law, justice is divided into expletive and attributive. (*f*) By the former—sometimes also denominated rigorous justice, perfect justice, or justice properly so called—is meant that whereby we discharge to

(*f*) Burlamaqui, *Principes du Droit de la Nature et des Gens*, pt. I, ch. xi. § 11; Grotius, *De Jur. Bell. ac Pac.*

lib. I, cap. I, § viii. “*Facultatem respicit justitia expletrix, aptitudinem respicit attributrix* :” Grot. in loc.

another, duties to which he is entitled by virtue of a perfect and rigorous obligation, and the performance of which, if withheld, he has a right to exact by force. The latter consists in the discharge of duties arising out of an imperfect or non-rigorous obligation, the performance of which can not be so exacted, but is left to each person's honor and conscience. These are comprehended under the appellations of humanity, charity, benevolence, &c. (*g*) Under a system of municipal jurisprudence, expletive justice must be understood to mean that which may be claimed of strict legal right; and attributive justice that which tribunals can either not notice at all, or only in virtue of an equitable jurisdiction modifying and restraining the rigor of the law.<sup>1</sup>

(*g*) An excellent example of the difference between these two kinds of justice is afforded by the well known anecdote of Cyrus, recorded by Xenophon, *Cyrop.* lib. 1, c. 3, and quoted by Grotius, in *loc. cit.* A big boy having a coat that was too small for him, and a little boy one that was too large for him, the big boy by force and against the will of the little one effected an exchange of coats; and Cyrus being appealed to, adjudged that he was right. But the master said this decision was wrong—for the question was not which coat was best suited to each boy, but to which did

the disputed coat belong—in other words, Cyrus had proceeded to administer attributive justice, when his jurisdiction only extended to expletive. The passages in the Mosaic law, “Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honor the person of the mighty; but in righteousness shalt thou judge thy neighbor.” *Lev.* xix. 15, and also *Exod.* xxiii. 3, are likewise cited in illustration of this principle, which is amply supported by other passages of Scripture. See *Deut.* i. 17, xvi. 19. *Prov.* xviii. 5, xxiv. 23, xxviii. 21. *John* vii. 24.

Different nations have different ideas of justice.—When the British Government sent an agent to the King of Dahomey, in 1852, instructed to bring about a discontinuance of that sovereign's trade in slaves, the latter answered in a letter which for naiveté is perhaps unsurpassed:

“The King of Dahomey presents his compliments to the Queen of England. The presents which she has sent him are very acceptable, and are good to his face. When Governor Winiett visited the king, the king told him that he must con-



37. So soon as societies were formed and the relations of sovereignty and subjection established, the imperfections of our nature indicated the necessity for municipal law. To administer perfect attributive justice, in all questions to which the innumerable combinations of human action give rise, is the high prerogative of Omniscience and Impeccability. For to this end are required, not only an unclouded view of the facts as they have occurred, and a decision, alike unerring and uncorrupted, on the claims of the contending parties; but a complete foresight of all the consequences, both direct and collateral, down to their remotest ramifications, which will follow from that decision. The hopelessness of ever accomplishing this, became early visible to the reflecting portion of mankind;<sup>1</sup> and, the observation of nature ( $\frac{1}{2}$ ) having taught them, that great ends are best attained by the

( $\frac{1}{2}$ ) "Le ley imitate nature." Per facit saltum, ita nec Lex. Co. Litt. Doddridge, J., in *Sheffield v. Ratcliffe*, 238 b. See also Co. Litt. 79 a. Jenk. 2 Rol. R. 502. Sicut Natura non Cent. I, Case 30; Hob. 144.

sult his people before he could give a final answer about the slave-trade. He can not see that he and his people can do without it. It is from the slave-trade that he derives his principal revenue. This he has explained in a long palaver to Mr. Cruikshank. He begs the Queen of England to put a stop to the slave-trade everywhere else, and to allow him to continue it. . . . The king begs the queen to make a law that no ships be allowed to trade at any place near his dominions lower down the coast than Wydah, as, by means of trading vessels, the people are getting rich and resisting his authority. He hopes the queen will send him some good tower-guns, and blunderbusses, and plenty of them, to enable him to make war (that is, razzias, in order to carry off captives for the barracu or slave-market).

<sup>1</sup> So as the world advances, and the means and channels of information become more accessible, modification of old rules becomes necessary. The absurdity of challenging a juror, for instance, whenever he had formed "an opinion" as to the guilt or innocence of the person to be tried before him, in great capital cases, where every person must have done so who could

steady operation of fixed general laws, they conceived the notion of framing general rules for the government of society—rules based on the principle of securing the largest amount of truth and happiness in the largest number of cases, however their undeviating action may violate attributive justice, or work injury in particular instances. (i) The rules established by authority for this purpose in each country constitute its municipal law.

(i) The finest description of municipal law to be found in any language, is that of Demosthenes, in his first Oration against Aristogiton: quoted in Christian's edition of Blackstone's Comm. vol. i. p. 44, note: "Οἱ δὲ νόμοι τὸ δίκαιον καὶ τὸ καλὸν καὶ τὸ συμφέρον βούλονται, καὶ τῷτο ζητῶσι καὶ ἐπειδὴν εὗρεθῇ, κοινὸν τῷτο πρόσταγμα ἀπεδείχθη, πᾶσιν ἴσον καὶ ὅμοιον· καὶ τῷτ' ἐστὶ νόμος, ὃ πᾶντας προσήκει πείθεσθαι διὰ πολλὰ, καὶ μάλισθ', ὅτι πᾶς ἐστὶ νόμος εὖρημα

μὲν καὶ δῶρον θεῶν, δόγμα δ' ἀνθρώπων φρονιμῶν, ἐπ' αὐτῷ νόρμα δὲ τῶν ἐκθεσίῶν καὶ ἀκθεσίῶν ἀμαρτημάτων, πόλεως δὲ συνθήκη κοινῇ, καὶ ἡν πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πόλει."

The following, taken from the works of Isidore, Bishop of Seville, Etymol. lib. ii. c. 10, is also worthy of notice:—"Erit autem lex, honesta, justa, possibilis, secundum naturam, secundum consuetudinem patriæ, loco temporisque conveniens, necessaria, utilis, manifestata quoque ne aliquid per obscuri-

read the newspapers, or who had ears to hear his neighbor's conversation, has long been apparent. In 1873, the legislature of the State of New York enacted that "the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoners, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action: provided the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously-formed opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror."—Laws of N. Y., Ch. 475, p. 1133.

38. The reasons for applying these principles of legislation, to evidence received in courts of justice, although less obvious, are equally satisfactory with those which originated the principles themselves. In the first place then we would observe, that the relations of cause and effect are manifestly innumerable; especially when those cases are taken into the account, where the effect does not follow immediately from its ultimate cause, and is only the mediate con-

tatem in captionem contineat, nullo privato commodo, sed pro communivum utilitate conscripta." See also Dig. lib. 1, t. 3, ll. 3 and 10; lib. 50, t. 17, l. 64. Our common-law authorities are strong to the same effect.—"Ad ea quæ frequentius accidunt jura adaptantur." Co. Litt. 238 a. 2 Inst. 137. 5 Co. 127 b. 6 Co. 77 a.—"Le ley est reasonable que provide pur le multitude, comet que ascun especial person ont perd' p c. Vix ulla lex fieri potest quæ omnibus comoda sit, sed si majori parti pspiciat, utilis est." Plowd. 369. "There hardly exists," says Lord Ellenborough, in *R. v. The Inhabitants of Haringworth*, 4 M. & Sel. 350, a general rule, out of which does not grow, or may be stated to grow, some possible inconvenience from a strict observance of it. Nevertheless, the convenience of having certain fixed rules, which is far above any other consideration, has induced courts of justice to adopt them, without canvassing every particular inconvenience, which ingenuity may suggest as likely to be derived from their application." In *P. 2 H. IV. 18 B. pl. 6* (cited in the note to *Burgess v. Gray*, 1 C. B. 586), the counsel for a defendant in the C. P. argued thus:—"This defendant is undone and impoverished forever, if this action is maintained against him, for then twenty other such suits will

be brought against him upon the like matter." Whereupon Thirning, C. J., interposed—"What is that to us? It is better that he should be quite undone than that the law should be changed for him." And, lastly, we would refer to the case of the *Prohibitions del Roy* in 12 Co. 63, M. 5 Jac. I. The archbishop had informed the king that he had a personal jurisdiction in ecclesiastical matters, which Sir Edward Coke, answering for himself and the rest of the judges, denied; saying, that the king in his own person can not adjudge any case, but that it ought to be determined and adjudged in some court of justice, according to the law and custom of England, &c., &c. "Then," continues the report, p. 64, "the king said, that he thought the law was founded upon reason, and that he and others had reason as well as the judges, to which it was answered by me, that true it was, that God had endowed his majesty with excellent science, and great endowments of nature; but his majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it, &c."

sequence of some subalternate one. Now "*Optima est lex, quæ minimum relinquit arbitrio judicis:*"<sup>1</sup> (*j*) but the power of a tribunal, however nicely defined by rules of substantive law, would soon be found absolute in reality, if no restraint were imposed on its discretion in declaring facts proved or disproved; and we accordingly find, that the laws of every well-governed state have established rules regulating the quality, and occasionally the quantity, of the evidence necessary to form the basis of judicial decision. And here the analogy to the other branches of municipal law seems complete. The exclusion of evidence by virtue of a general rule may, in particular instances, exclude the truth, and so work injustice; but the mischief is immeasurably compensated, by the stability which the general operation of the rule confers on the rights of men, and the feeling of security generated in their minds by the conviction, that they can be divested of them only by the authority of the law, and not at the pleasure of a tribunal. The two principal checks which the law of England imposes on its tribunals in this respect are, first, the prohibiting judges and jurymen from deciding facts on their own personal knowledge, and placing them as it were in a state of legal ignorance, as to almost everything relating to the matters in question, except what is established before them by evidence. (*k*) Its maxim is, "*Non refert*

(*j*) *Bac. de Augm. Scient.* lib. 8, c. 3, tit. 1, Aphorism. 46.

(*k*) 7 *H. IV.* 41, pl. 5; *Plowd.* 83; 1 *Leon.* 161. See the authorities in the following notes, and *infra*, bk. 1, pt. 1. The canonists seem to have been somewhat loose in this respect.

See *Decret. Greg. IX.* lib. 5, tit. 1, l. 9; *Calvin, Lex Jurid. voc. "Notorium;"* *Gibert, Corpus Jur. Canon. Proleg. Pars Post.* tit. 7, cap. 2, § 2, N. ix., and *Devotus, Inst. Jur. Can.* lib. 3, tit. 14, § 10, not. 1.

<sup>1</sup> That system of law is best which confides as little as possible to the discretion of the judge.—*Broom. Leg. Max.* 84.

quid notum sit judici, si notum non sit in forma judicii:" (*l*) and the principles, "De non apparentibus et non existentibus eadem est ratio," (*m*) "Idem est non esse et non apparere," (*n*) "Quod non apparet non est," (*o*) "Incerta pro nullis habentur," (*p*) &c., so false in philosophy, become perfectly true in our jurisprudence. The second is, the exacting as a condition precedent even to the reception of evidence, that there be an open and visible connection between the principal and evidentiary facts, — "Nemo tenetur divinare" (*q*)—"Probationes debent esse evidentes, (id est) perspicuæ et faciles intelligi." (*r*) This indeed is only following out a great principle which runs through our whole law—"In jure non remota causa, sed proxima spectatur." (*s*) One or two instances will illustrate. If things are traced up to their ultimate sources, the remote though chief cause of the appearance of a criminal at the bar might be found in his parents, his education, the example of others, the law itself, or even the very judge by whom he is tried; still the tribunal can not enter upon such matters, and must only look at the proximate cause—his own act. So, the non-payment of a debt has for its proximate cause the debtor's neglect, but the ultimate cause may be the default of others whose duty, either legally or morally, it was to have supplied him with money.

(*l*) 3 Bulst. 115. "Nous ne pouvons pas aller à jugement sur notorie chose, eins selonque ce que le proces est devant nous mesmes." Per Herle, C. J., H. 7 Edw. III. 4 A. pl. 7.

(*m*) 4 Co. 47 a; 5 Co. v. b.; 12 Id. 53, 134; 3 Bulst. 110; Hob. 295; 1 T. R. 404; 7 M. & W. 437; 10 Bingh. 47; 6 Bingh. (N. C.) 539; 7 M. & W. 437.

(*n*) Jenk. Cent. 5, Cas. 36.

(*o*) 2 Inst. 479.

(*p*) Davys, 33; Lofft, M. 555; Broom's Max. xxvii. 3rd Ed.

(*q*) 4 Co. 28 a, and 66 b; 10 Co. 55 a. See also Bac. Max. sub reg. 3; Litt. R. 98; Lofft, M. 559.

(*r*) Co. Litt. 283 a.

(*s*) Bac. Max. of the Law, Reg 1 12 East, 652; 14 M. & W. 483; 18 C. B. 379; 18 Jurist, 962; 6 B. & S. 881 H. & R. 61. See infra. bk. 1, pt. 1.

39. And here must be noticed a false principle which is to be found in some systems of jurisprudence, and which runs through Bentham's work on judicial evidence—viz., the assumption that there is a perfect, or even close, analogy between justice administered by a parent in his family, and justice administered by municipal tribunals between man and man. "Before states existed," (*t*) says the eminent writer just quoted, "at least in any of the forms now in existence in civilized nations, families existed. Justice is not less necessary to the existence of families than of states. The mode in which, in those domestic tribunals, created by nature at the instance of necessity, justice was administered, and, for that purpose, facts were inquired into, may, for distinction's sake, be termed the natural or domestic mode of judicature. It is among the characteristics of the natural or domestic mode of judicature, to be exercised (if not absolutely, at least comparatively speaking) without forms, without rules. A man judges, as Monsieur Jourdan talked prose, unconscious of any science displayed, of any art exercised. One of your two sons leaves his task undone, and tears his brother's clothes: both brothers claim the same plaything: two of your servants dispute to whose place it belongs to do a given piece of work. You animadvert upon these delinquencies, you settle these disputes: it scarce occurs to you that the study in which you have been sitting to hear this, is a tribunal, a court; your elbow chair a bench; yourself a judge. Yet you could no more perform these several operations, without performing the task of judicature, without exercising the functions of a judge, without hearing evidence, without making inquiry, than if the subject of inquiry

(*t*) 4 Benth. Jud. Ev. 7, 8.

had been the Hastings cause, the Douglas cause, or the Literary Property cause." From all this he draws the conclusion that courts of summary jurisdiction are courts of natural procedure, (*u*) and very superior both in theory and practice to the ordinary and regular tribunals. Under the former he reckons courts of request, courts of conscience, courts martial, and summary proceedings before justices of the peace, &c.; and he not only lavishly praises them in many passages of his work on Judicial Evidence, (*x*) but in a work published in 1790, when speaking of this country, assures the French nation, that "Imagination can not conceive, nor heart desire, greater integrity than has been uniformly displayed for ages, by courts composed of single judges, without juries, under the auspices of publicity, though in a state of dependence on the crown." (*y*)

40. Now we have no wish to discuss the merits of these tribunals, further than to observe that courts of request and courts of conscience have been superseded by a jurisdiction of a very superior kind, introduced by 9 & 10 Vict. c. 95; and that we really are not aware that courts martial, at least in general, are conducted without forms. But the fallacy of the reasoning on which the praise of summary tribunals is founded, arises from losing sight of the great principle, that the essence of all rules of municipal law, adjective as well as substantive, consists in their generality. The observation is as old as the days of Aristotle, that a commonwealth is not to be confounded with a family, as though a large family were nothing

(*u*) 4 Benth. Jud. Ev. 8-12.

(*x*) See inter al., vol. ii. pp. 28, 29: vol. iv. pp. 327, 352, 355, 356, 357, 405, 430, 431, 432, 437-439, 443, 628.

(*y*) Drott of a new plan for the Organization of the Judicial Establishment in France, March, 1790, ch. 2 tit. 2, p. 7.

different from a small commonwealth; (z) and a very little reflection will show the difference between them. The parent in his family administers a kind of attributive justice. Both by natural and municipal law he is invested with, comparatively speaking, an absolute power over his children; this is indispensably necessary, to guide the conduct and form the characters in whom reason and experience are almost a blank; and the feeling of parental affection is so strong that this power may in general be safely intrusted to him. But the case is quite different with a sovereign, or judge, governing for the common welfare a set of beings of matured intellect like himself. A pure, unlimited monarchy is unquestionably the natural and primitive form of government, but does it thence follow that it is the best at the present day, and that all others ought to be extirpated? On the other hand, how absurd would it be to argue, that because a constitutional monarchy is an excellent form of government for a country, each private individual should establish one in his family! The very statement of these propositions is their refutation; and yet it is the same sort of reasoning which would infer that pre-established forms are useless in public judicial investigations, because they would be useless, or worse, in foro domestico.

41. Again; the duty of a judicial tribunal in dealing with facts, is not limited to the abstract question of their existence; for, whether materials for definite judgment or belief respecting it are forthcoming or not, a decision must be given, to be followed by speedy, if not immediate action.<sup>1</sup> Questions of phil-

(z) Aristotle's *Politics*, bk. I, ch. I.

<sup>1</sup> Without evidence or with bad rules, the judge of fact is as powerless to do justice as the Hebrew of old was to make



osophy, whether natural or moral, as well as questions of history, rest for the most part in speculation, and may be undertaken, dropped, and renewed, at pleasure or convenience. Whether, for instance, the law of gravitation extends beyond the solar system; whether there is any determinate law of relation between the magnitudes of the planets and their distances from the sun; whether the motion of each of what are inaccurately termed fixed stars, is independent or only forms part of some gigantic system, are at present matters for investigation lying open to men in general; and the astronomer, who considers that the materials before him are insufficient to warrant his forming a positive opinion on any of these subjects, may suspend his judgment, in the hope that the observation of additional phenomena, or an improved analysis, or both combined, will disclose the truth to more fortunate generations. So, whether the army with which Xerxes invaded Greece consisted of thousands or millions of men; whether Cæsar was implicated in the Catilinarian conspiracy; whether King Richard III. murdered his nephews; and a host of such like questions, are questions the solution of which may be deferred, or even pronounced impossible, without in the least affecting the rights of individuals, or the peace and good order of society. In the general course of every-day life, also, we are rarely compelled to act on mere conjectures, and commonly remain passive as long as possible, in the hope of procuring satisfactory evidence to confirm or dissipate them. But judicial inquiries differ widely from all these. "Interest (or 'expedit') republicæ ut sit finis litium;"

brick without the needed straw.—Appleton on the Rules of Evidence, preface.

(a) "Ne lites immortales essent dum litigantes mortales sunt." (b) The plaintiff and defendant stand before the tribunal, and both individual and social interests require from it a decision, and that, too, a speedy decision, one way or the other. It will not do for the judge to say, "This matter seems doubtful: I suspend my judgment," and dismiss it, to be renewed indefinitely from time to time; keeping alive all the annoyance and irritation of a law-suit; holding out to each of the parties, a manifest temptation to fabricate evidence in order to turn the scale in his favor; and injuring the community, by distracting the attention of at least two of its members from the exercise of more useful avocations. All this, however, is very different from adjourning a court for a definite time, for the purposes of justice. (c)

42. The duty of the legislator, therefore, is not discharged by framing substantive laws and establishing forms of judicial procedure; in order to do complete justice he must go further, and supply rules for the guidance of tribunals in the disposal of all matters of fact which come before them, whatever the nature of the inquiry, or however difficult or even impossible it may be to get at the real truth. In such straits barbarism and ignorance either decide at haphazard in each particular instance, or dogmatically lay down unbending rules to be applied in all cases, or invoke the aid of superstition—sometimes, as in the trials by ordeal which have prevailed both in the ancient and modern world, and in the judicial combats of the middle ages, audaciously and impiously calling on Heaven to vindicate the injured party by a miracle;

(a) 4 Blackst. Com. 338; Co. Litt. 103 a, 303 b; 6 Co. 9 a, and 45 a; 11 Id. 69 a; 3 H. & N. 647.

(b) Voet. ad. Pand. lib. 5, tit. 1. n. 53; 17 C. B. 140, per Willes, J.

(c) 17 & 18 Vict. c. 125, s. 15.

and at others, as in the old system of canonical purgation and the wager of law of our ancestors, unwarrantably assuming that the truth will be extracted, by the oath of the party who is most strongly interested in its concealment. (*d*) On the other hand, the laws of countries where the true principles of jurisprudence are understood, meet the difficulty by establishing rules to regulate the burden of proof; or, most usually, to speak with strict accuracy, by attaching an artificial weight to the natural principles by which the

(*d*) A very good account of these is given by Bonnier, in his *Traité des Preuves*, §§ 745-750, 2nd Ed. See also 4 Blackst. Comm. ch. 27: Devotus, Inst. Jur. Can. lib. 3, tit. 9, § 26, not. (3), and § 30, in notis, and Gibbon's *Decline and Fall of the Roman Empire*, ch. 38. Besides the absurdity and impiety of these presumptuous appeals to miraculous interposition, there can be little doubt that the danger of them was often evaded by management, so as to be more apparent than real. The following curious instance of this, taken from an ancient ecclesiastical authority, is given in the *Law Magazine*, N. S. vol. i. p. 8. After a long dispute between a Catholic deacon and an Arian, on the merits of their respective creeds, the Catholic says, "Quid longis sermocinationum intentionibus fatigamur? Factis rei veritas adprobetur. Succendatur igni æneus et in ferventi aqua annulus cujusdam projiciatur; cui vero eum ex ferventi unda sustulerit, ille justitiam consequi comprobatur, quo facto pars diversa ad cognitionem hujus justitiæ convertatur." The Arian agrees. "Circa horam tertiam in foro conveniunt, concurrit populus ad spectaculum, accenditur ignis, æneus superponitur, fervet valde, annulus in unda ferventi projicitur."

The Catholic invites the Arian to plunge his arm first into the seething water; the latter declines the first trial, urging the Catholic, as the challenger, to begin. The Catholic bares his arm, but the Arian beholding it smeared with oil exclaims that a fraud is intended, on which Jacinthus, another Catholic deacon, happening accidentally (of course) to pass that way, inquires into the cause of strife. The issue is thus related: "Nec moratus, extracto a vestimentis brachio in æneum dexteram mergit. Annulus enim, qui ejectus fuerat, erat valde lævis ac parvulus, nec minus ferebatur ab unda quam vento possit ferri vel palea. Quem diu multumque quæsitum, infra unius horæ spatium reperit. Accendebatur interea vehementer focus ille sub dosio, quo validius fervens non facile adsequi possit annulus a manu quærentis, extractumque tandem nihil sensit diaconus in carne sua, sed potius protestatur in imo quidem frigidum esse æneum, in summitate vero calorem teporis modici continentem. Quod cernens hæreticus, valde confusus, injectit audax manum in æneo, dicens: præstabit mihi hæc fides mea. Injecta manu, protinus usque ad ipsa ossium internodia omnis caro liquefacta defluxit; et sic altercatio finem fecit."

burden of proof is governed. This has been well explained by a foreign jurist, in language of which the following is a translation. (*e*) "The determining to what extent, a certain known element renders probable the existence of such or such an unknown cause, governed, as it necessarily is, by the light of reason, in general depends wholly on the discrimination of the judge. But in the most important cases the law, desirous of insuring the stability of certain positions, and of cutting short certain controversies, has established presumptions, to which the judge is obliged to conform." And in another place, (*f*) "It is not always possible for man to arrive at a perfect knowledge of the truth in each particular case, and yet social necessities do not always allow him to suspend his judgment and refrain. The stability of the

(*e*) Bonnier, *Traité des Preuves*, § 710, 2nd Ed. We subjoin the original. "La question de savoir jusqu'à quel point tel élément connu, rend vraisemblable l'existence de telle ou telle cause inconnue, subordonnée par sa nature aux lumières de la raison, dépend en général uniquement de l'appréciation du juge. Mais, dans les cas les plus importants, la loi, voulant assurer la stabilité de certaines positions, et couper court à certaines controverses, a établi des présomptions auxquelles le juge est obligé de se conformer."

(*f*) *Id.* §§ 733, 734, 2nd Ed. "Il n'est pas toujours possible à l'homme d'arriver à la connaissance parfaite de la vérité dans chaque cas particulier, et cependant les nécessités sociales ne lui permettent pas toujours de suspendre son jugement et de s'abstenir. La stabilité de l'état des personnes, celles des propriétés, enfin le besoin de calme et de sécurité pour une foule d'intérêts précieux, obligent le législa-

teur à tenir pour vrais un grand nombre de points, qui ne sont pas démontrés, mais dont l'existence est établie par une induction plus ou moins puissante. L'ordre politique, comme l'ordre social, ne repose que sur des présomptions légales. L'aptitude à exercer certains droits, à remplir certaines fonctions, ne se reconnaît qu'au moyen de certaines conditions déterminées à priori, une vérification spéciale pour chaque individu étant évidemment impracticable. Plus les relations sociales se compliquent, plus il devient nécessaire de multiplier ces présomptions. . . . Les motifs qui ont déterminé le législateur à établir telle ou telle présomption, tiennent le plus souvent au droit bien plus qu'au fait. Ce qu'il examine surtout, ce n'est pas si le fait connu réunit tous les caractères suffisants pour rendre probable le fait inconnu, mais seulement si l'intérêt social exige que l'on conclue de la constatation de l'un à l'existence de l'autre "

state of person and property, in a word, the want of peace and security for a multitude of precious interests, compel the legislator to hold as true a great number of points which are not demonstrated, but whose existence is established by an induction more or less cogent. Political order, like social order, rests only on legal presumptions. The capacity of exercising certain rights, discharging certain functions, can be recognized only through the medium of certain conditions determined *à priori*, a special verification for each individual instance being evidently impracticable. The more social relations become complicated, the more it becomes necessary to multiply these presumptions. . . . The motives which have induced the legislator to establish such or such a presumption, much more frequently belong to law than to fact. What he chiefly considers is, not whether the known fact combines all the characteristics requisite to render the unknown fact probable, but solely whether social interest requires that, from the proof of the one, the existence of the other ought to be inferred." And a late eminent judge observed in one case, (*g*) "The laws of evidence as to what is receivable or not, are founded on a compound consideration of what, abstractly considered, is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally gone into; and inquiries carried on from month to month as to the truth of everything connected with it. I do

(*g*) Roife, B., in *The Attorney-General v. Hitchcock*, T. 10 Vict. 11 Jurist, 478, 482; S. C., 1 Exch. 91.

not say how that would be, but such a course is found to be impossible at present."

43. These legal presumptions (*h*) are of two kinds. In most of them the law assumes the existence of something until it is disproved by evidence—called by the civilians *præsumptiones juris*, or *præsumptiones juris tantum*; and likewise, by English lawyers, inconclusive or rebuttable presumptions. In others, although these are much fewer in number, the presumption is absolute and conclusive, so that no counter-evidence will be received to displace it. These are called *præsumptiones juris et de jure*—a species of presumption correctly defined, "*Dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis.*" (*i*) To this class belong the contract to pay, which the law implies from the purchase of goods; the intent to kill or do grievous bodily harm, implied from the administration of poison, using deadly weapons, &c. Some may be considered as belonging to universal jurisprudence; the principal of which are, the presumption of right derived from the continued and peaceable possession of property, and the presumption upholding the decisions of courts of competent jurisdiction. We have already alluded to the maxim, "*Interest reipublicæ ut sit finis litium*;" (*k*) to which must be added, "*Vigilantibus et non dormientibus jura subveniunt*," (*l*) and "*Ex diuturnitate temporis omnia præsumuntur solenniter esse acta.*" (*m*) If undisturbed possession for a very long time had not a conclusive effect, the most

(*h*) There are presumptions of fact as well as presumptions of law. See *supra*, Part I, §§ 7 and 27, and *infra*, bk. 3, pt. 2, ch. 2.

(*i*) *Alciatus de Præsumptionibus*, part 2, n. 3: *Menochius de Præsump-*

*tionibus*, lib. 1, Quæst. 3, n. 17; 1 *Ev. Poth.* § 807.

(*k*) *Supra*, § 41.

(*l*) 2 Co. 26 b; 4 *Id.* 10 b; 82 b; *Hob.* 347; 2 B. & P. 412; 5 C. B. 74.

(*m*) Co. Lit. 6 b; *Jenk. Cent.* 1, Cas. 91.

valuable rights would not only be made the subject of continual dispute, but be liable to be divested or overthrown when the original evidences of the title to them had become lost or decayed by time. (*n*) And accordingly, among the various ways in which property may be acquired, we find both writers on natural law, and the positive codes of nations, recognizing that of "prescription," *i.e.*, uninterrupted use or possession for a period longer or shorter. (*o*)

44. So, it would be productive of the greatest inconvenience and mischief if after a cause, civil or criminal, has been solemnly determined by a court of competent and final jurisdiction, the parties could renew the controversy at pleasure, on the ground either of alleged error in the decision, or the real or pretended discovery of fresh arguments or better evidence. The slightest reflection will show, that if some point were not established at which judicial proceedings must stop, no one could ever feel secure in the enjoyment of his life, liberty, or property; while unjust, obstinate, and quarrelsome persons, especially such as are possessed of wealth or power, would have society at their mercy, and soon convert it into one vast scene of litigation, disturbance, and ill-will. The great principle of the finality of judicial decision, is universally recognized, and has been expressed in the

(*n*) "If time," says Lord Plunket, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the law-giver has placed an hour-glass, by which he metes out, incessantly, those portions of duration which render needless the evidence that he has

swept away."—Lord Brougham's *Historical Sketches of Statesmen, &c.*, vol. 2, p. 39, note—*Life of C. J. Busche.*

(*o*) Grotius de Jur. Bell. ac Pac. lib. 2, c. 4; Pufendorf, *Jus Nat. et Gent.* lib. 4, c. 12; Dig. lib. 41, tit. 3; Cod. lib. 7, tit. 33; 2 Blackst. Comm. ch. 17; Co. Litt. 113, 114; 1 Greenl. Ev. § 17, 7th Ed.; Grand Coustumier de Normendie, ch. 125; Poth. Obl. part 3, ch. 8; Cod. Civil. liv. 3, tit. 20.

various forms—"Res judicata pro veritate accipitur;" (*p*) "Judicium pro veritate accipitur;" (*q*) "Interest reipublicæ res judicatas non rescindi;" (*r*) "Præsumitur pro justitia sententiæ;" (*s*) "Sententia facit jus;" (*t*) "Infinitum in jure reprobatur;" (*u*) "Nemo debet pro una causa bis vexari," (*x*) &c.<sup>1</sup>

45. We will merely add one other instance, which places this matter in the strongest light. If the

(*p*) Dig. lib. 50, tit. 17, l. 207; Mascard. de Prob. Concl. 1237, n. 13; 1 Ev. Poth. part 4, ch. 3, sect. 3, art. 3, § 37; Co. Litt. 103 a; and 186 a; n. (3), by Hargr.

(*q*) Co. Litt. 39 a, 168 a, 236 b; 2 Inst. 380.

(*r*) 2 Inst. 360.

(*s*) Mascard. de Prob. Concl. 1237 n. 2. See 3 Bulst. 42, 43.

(*t*) Ellesm. Postn. 55.

(*u*) 2 Inst. 340; 6 Co. 45 a; 8 Id. 168 b; 12 Co. 24; Hob. 159; Jenk. Cent. 2, Cas. 15; Cent. 4, Cas. 2 and 46; and Cent. 8, Cas. 29.

(*x*) Jenk. Cent. 1, Cas. 38; 5 Co. 61 a.

<sup>1</sup> All merely cumulative matter in evidence or argument, which may be discovered after a trial, undoubtedly should not justify a second or new trial (*Gardner v. Lamback*, 47 Ga. 133; *Hughes v. Coursey*, 46 Id. 115; *Tull v. Pope*, 69 N. C. 183). But there are cases where it will be extended as a matter of right (See *Brown v. State*, 47 Ala. 47; *Aulkbulkley v. Andrews*, 37 Conn. 524; *Jackson v. Jackson*, 47 Ga. 99; *Melliken v. Ham*, 36 Ind. 166; *Wehrum v. Kuhn*, 34 N. Y. Superior Ct. 336; *Lloyd v. State*, 45 Ga. 57). So, for misconduct, bias, or disqualification of the jurors (*Williams v. McGrade*, 18 Min. 82; *Fitzgerald v. People*, 1 Col. T. 56; *State v. Wyatt*, 50 Mo. 309; *Westmorland v. State*, 45 Ga. 225; *Davis v. State*, 35 Ind. 476; *United States v. Smith*, 1 Sawyer, 277; *People v. Guffrey*, 14 Abb. (N. Y.) Pr. N. S. 36; *Toliver v. Moody*, 9 Ind. 148; *Hamilton v. Pease*, 38 Conn. 115; *Love v. Moody*, 68 N. C. 200; *State v. Wiseman*, Id. 203). Surprise, which ordinary prudence could not have foreseen,—as that a witness testified differently on the trial from what he had on a previous trial, and that no effort was made to impeach him,—has been held to justify a new trial (*Abeles v. Cohen*, 8 Kan. 180). The power of courts to grant new trials is limited, in many states, by statute. Thus, a statute of Illinois provides that no more than two new trials shall be granted in the same case (*Stanberry v. Moore*, 56 Ill. 472). So, as to the Wisconsin statute, see *Stoppelfeldt v. Milwaukee, &c. R. R. Co.*, 29 Wis. 688; *Michigan, People v. Judge, &c.*, 24 Mich. 42.



abstract question were proposed, "What is the most unjust thing that could be done?" the answer probably would be, "The punishing a man for disobeying a law with the existence of which he was not acquainted." And yet that must constantly occur everywhere; there being no rule of jurisprudence more universal than this, that every person in a country must be conclusively presumed to know its laws sufficiently to be able to regulate his conduct by them, (*y*)—"Ignorantia juris, quod quisque tenetur scire, neminem excusat." (*z*) Hard as this may seem, it is indispensably necessary in order to prevent infinitely greater evils; for the allowing violations of the criminal, or contraventions of the civil code, to pass without punishment or inconvenience, under the plea of ignorance of their provisions, would render the whole body of jurisprudence practically worthless. If none were amenable to the laws but those who could be proved to be acquainted with them, not only would ignorance be continually pleaded, in criminal cases especially, but persons would naturally avoid acquiring a knowledge which carried such perilous consequences along with it.

46. But if artificial presumptions have their use they have likewise their abuse. In unenlightened times, or in the hands of a corrupt tribunal, they are most dangerous instruments; and even in the best times, and by the best tribunals, they require to be handled with discretion. Some very absurd and mischievous presumptions of this kind are to be found in the works of the civilians, (*a*) as well as in the laws

(*y*) Dig. lib. 22, tit. 6, l. 9; Heinec. ad pand. pars. 4, § 146; Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. R. 13; Doctor and Student, Dial. 1, c. 26; Dial. 2, cc. 16, 46; Plowd, 342, 343;

1 Co. 177 b; 2 Co. 3 b; 6 Co. 54 a; 1 Hale, P. C. 42; 7 Car. & P. 456.

(*z*) 4 Blackst. C. 27.

(*a*) See Struvius, Syntagma Juris Civilis, by Müller, Exercit. 28, § xviii.

of modern France; (*b*) and in this country juries have been frequently advised, if not directed, by judges, to presume the grossest absurdities under color of advancing justice. (*c*) A well-known instance of an extremely violent and harsh presumption, is to be found in the statute 21 Jac. 1, c. 17; by which it was enacted, that every woman delivered of bastard issue, who should endeavor privately either by drowning or secret burying, or in any other way, to conceal the death thereof, so that it might not come to light whether it were born alive or not, should be deemed to have murdered it, unless she proved it to have been born dead. This cruel enactment, which seems to have been copied from an edict of Hen. II. of France in 1556, (*d*) the principle of which is also to be found in the laws of some other countries, (*e*) has been repealed by the 43 Geo. 3, c. 58, s. 3. The conclusive effect formerly ascribed to the confessions of accused persons, (*f*) and to attempts by flight to escape judicial inquiry, (*g*) are likewise among the most general instances.<sup>1</sup>

note (c). "Idem dico," says Bartolus, "si aliquis deprehenditur in domo alicujus, ubi pulchra mulier est, certè facit hunc adulterium manifestum:" Comment. in 2dam part. Dig. Nov. 111 b, Edit. Lugd. 1581.

(*b*) See Bonnier, *Traité des Preuves*, § 752, et seq., 2nd ed.

(*c*) See *infra*, bk. 3, pt. 2, ch. 2.

(*d*) Domat, *Lois Civiles*, part 1, liv. 3, tit. 6; Préambule, note (a); and *Id.* sect. 4, § 2, note (b).

(*e*) 4 Blackst. Comm. 198.

(*f*) See bk. 3, pt. 2, c. 7.

(*g*) See bk. 3, pt. 2, c. 2.

<sup>1</sup> But, in all systems of jurisprudence, the *corpus delicti* must be first proved before any presumption can be invoked. Said Lord Hale (P. C. 290): "Convict any person for stealing the goods, *ejusdam ignoti*, merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or, at least, the body found dead." And so, in *Tyner v. State* (6 Humphreys, 383), it was held that conduct, exhibiting satisfactory indications of guilt,

47. There are some exclusionary rules connected with this branch of the subject, the absolute necessity for which it would require extreme hardihood to deny. We mean where evidence is excluded on the ground that its production would cause needless vexation, expense, or delay. (*h*) In illustration of the two former,

(*h*) Bentham, whose work on Judicial Evidence is a professed attack on artificial systems of proof in general, admits that the most legitimate evidence may be rightly rejected on these grounds, even at the risk of doing injustice. See vol. i. p. 31; vol. iv. p. 115; and bk. 9, pt. 2, cc. 1, 2, 3, 4.

is not sufficient to sustain a conviction, without satisfactory evidence that a crime has been committed; and that a mere declaration in evidence, that the particular crime has been committed, is not evidence of a *corpus delicti*. Said Lord Stowell (*Evans v. Evans*, 1 Hagg. Const. R. 105): "To take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions. This was the principle of the Roman law, '*Delegenter cavendum est judici, ne supplicium præcipitet, antequam de crimine constiterit*'" (1 De Crim. in Dig. lib. 48, tit. 16, ch. 1, Matth.), though against Sextus Roscius, in whose defense Cicero pronounced one of his most polished efforts, as Mr. Forsyth has pointed out (See his *History of Lawyers*, N. Y., Cockcroft & Co., 1875, p. 145), there appears to have been actually no presumption at all. And see the dictum of Lord Hale (above quoted), discussed and disapproved of in *People v. Ruloff*, 3 Parker (N. Y.) C. R. 401, the court holding (Balcom, J., dissenting), that where, on a trial for murder, there is no direct evidence of the *corpus delicti*, and it is evident that none can be adduced, it may be proved by circumstantial evidence, which is so strong and so intense as to produce the full certainty of death, leaving no room for reasonable doubt. "I cannot concur," said Balcom, J., in his dissenting opinion, "in sustaining the verdict in this case, because the evidence is such that it is possible that the defendant's daughter is yet living. That it is extremely improbable that she is living will not do. The evidence must be certain that she is dead before the defendant can be lawfully convicted" (Id. p. 464). And consult, further, *Ruloff v. People*, 18 N. Y. 4 Smith, 179 (where Lord Hale's dictum was ultimately affirmed); *Mitchum v. State*, 11 Ga. 615; and an able chapter on "Presumptions," in Wharton on Homicide. And see also Phillips' Essay on the Theory of Presumptive

the following case has been put: (*i*) "By laying a barrow full of rubbish on a spot on which it ought not to have been laid (the side of a turnpike road), Titius has incurred a penalty of 5*s*. No man was witness to the transaction but Sempronius; and in the station of writer, Sempronius is gone to make his fortune in the East Indies. Should Sempronius be forced, if he could be forced, to come back from the East Indies for the chance of subjecting Titius to this penalty. Who would think of subjecting Sempronius to the vexation? Who would think of subjecting Sempronius, or anybody else, to the expense?" Again, while the liberty of adducing evidence to support his cause ought to be most freely conceded to every litigant—"Facultas probationum non est angustanda" (*k*)<sup>1</sup>—that liberty might be so grossly abused as to stop the administration of justice; and a power in all tribunals to restrain it within due bounds, is consequently as essential to the proper discharge of their functions, as the right of expunging surplusage in forensic documents, and restraining prolixity in pleading. "Excessus in re qualibet jure reprobatur communi." (*l*) Suppose a man sued for a debt, or an injurious act of the simplest and most ordinary kind, were to pretend that he required for his defense the evidence of some hundreds of witnesses living in remote and different parts of the world, a court is surely not bound to take his word or his oath for the truth of this or even for his bona fides in asserting it. Accordingly,

(*i*) 4 Benth. Jud. Ev. 479, 480.

(*l*) 2 Inst. 232 and 107; 11 Co.

(*k*) 4 Inst. 279. See also Cod. lib. 44.

l. tit. 5, l. 21, vers. fin.

Proof (Famous Cases of Circumstantial Evidence, N. Y. Cockcroft & Co., 1874).

<sup>1</sup> The opportunity of proving one's cause should not be rendered difficult.

in the judicial practice of this country, a commission or mandamus to examine witnesses will be refused, or terms will be imposed on the party making the application, if the judges think, in their discretion, that the application for it is made with a view to vexation or delay, or with any other sinister or improper motive. (*m*)<sup>1</sup> So, we apprehend, a power (to be exercised with great caution no doubt) is vested in every tribunal, of refusing to hear evidence obviously tendered for such purposes. (*n*) "*Quamquam*," says the Digest, (*o*) "*quibusdam legibus amplissimus numerus testium definitus sit: tamen ex constitutionibus Principum hæc licentia ad sufficientem numerum testium coarctetur, ut iudices moderentur, et eum solum numerum testium, quem necessarium esse putaverint, evocari patiantur; ne effrenatâ potestate ad vexandos homines superflua multitudo testium protrahatur.*"<sup>2</sup> Still, in all these, the evidence offered might really be relevant and important, and injustice might be done by its rejection.

(*m*) *Pirie v. Iron*, 8 Bingh. 143; *Brydges v. Fisher*, 4 M. & Scott, 458; *Sparkes v. Barrett*, 5 Scott, 402; *De Rossi v. Polhill*, 7 Id. 836; *Dalton v. Lloyd*, 1 Gale, 102; *Summers v. Rawson*, 3 Jur. 288; *Castelli v. Groom*, 16 Jur. 888, &c.

(*n*) In the Irish State Trials of 1843, the defendants were indicted for a seditious conspiracy, and among the overt acts, were laid the holding in different parts of that kingdom what were called "*monster meetings*," *i. e.* meetings at each of which several

hundreds of thousands of persons were present. In order to prevent the case ever getting to the jury, it was, as we are informed, suggested to the defendants, that under pretense of showing that those meetings were not of a seditious character, they might call as witnesses every one of the persons present at them. This dishonorable mode of defense was not resorted to; but suppose it had been, must the court and jury have submitted to it?

(*o*) Dig. lib. 22, tit. 5 l. 1, § 2.

<sup>1</sup> *McCall v. Sun Mut. Ins. Co.*, 50 N. Y. 733. *Rathbun v. Ingersoll*, 34 N. Y. Superior Ct. (J. & S.) 211; *Brand v. Butler*, 30 Wis. 681; *Sydnor v. Palmer*, 29 Wis. 226.

<sup>2</sup> *Quoi qu'il-y-ait certaines lois qui exigent un nombre considerable de témoins, cependant cette nécessité est restreinte par les constitutions des princes dans les bornes d'un*

48. The lawgivers of some countries, sensible of the evils that may be occasioned by malpractices like the above, have, in endeavoring to suppress them, run into positive absurdity. We allude to the practice of limiting by law the number of witnesses that may be called in proof of each fact in dispute, (*ρ*) without regard to the nature of the cause, the probity of the witnesses, the quantity of evidence given by them, or their manner of delivering their testimony—things which it would obviously be impossible to define by any rule laid down beforehand.

49. Another marked feature by which judicial proof is distinguished from other forms of proof is, that the legislator by whom its rules are framed must look beyond the contending parties in each case, and weigh the consequences to society which may follow from the decisions of tribunals. Thus the mischiefs which arise from a blamable passiveness in the law, are not usually so great as those which spring from its misguided action. For instance, the condemnation

(*ρ*) § Benth. Jud. Ev. 521 ; Domat, Lois Civiles, part 1; liv. 3, tit. 6, sect. 3, § xvi. note (x), vers. fin. ; Devot. Inst. Canon. lib. 3, tit. 9, § 9 ; Decretal. Greg. IX. lib. 2, tit. 20, c. 37. "To any given fact or question (*fait* [fact], French: *pregunta* [question],

Spanish), thirty witnesses were and are allowed by Spanish law ; ten only are, or at least were, allowed in French law. Are both right ? One French witness, then, is equal to three Spanish ones." Benth. in loc. cit.

nombre suffisant. Les juges peuvent le fixer, et ne permettre d'assigner que le nombre de témoins qu'ils jugeront nécessaire : de peur qu'on ne prenne de la occasion d'assigner un nombre inutile de témoins, dans la seule intention de vexer ceux à qui on vent du mal (Digeste). Although there are a large number of laws which these things might properly be regulated by—the local customs of rulers, or of certain localities—yet judges ought to be allowed to fix the necessary number of witnesses to a certain point, so that the time and convenience of courts may not be vexatiously squandered and embarrassed by a useless superfluity of witnesses and testimony.

and punishment of an innocent man for a supposed crime, and the acquittal of a guilty one are, philosophically speaking, only modes of misdecision, diverging equally from the truth. But a very little reflection will show that, taken with their consequences, the former is incalculably the greater evil; and the legislators and jurists of almost every age and country have recognized the principle,—however violated in practice,—that, although the punishment of guilt and the protection of innocence have in general an equal claim in the administration of justice, the latter should be the primary care of the law; and consequently that in matters of doubt it is safer to acquit than to condemn. (g) Again, the laws of every country suppress much

(g) See the following authorities, the number of which might be almost indefinitely increased: Deut. xvii. 4, 6; Dig. lib. 48, tit. 19, l. 5; Cod. lib. 4, tit. 19, l. 25; Grotius, *Jus Bell. ac Pac. lib. 2, cap. 23, § v. n. 1*; Huberus, *Præl. Jur. Civ. lib. 22, tit. 3, N.N. 4 & 16*; Voet. ad Pand. lib. 22, tit. 3, N. 18; Matth. de Prob. cap. 2, N. 20; Mascard. de Prob. Concl. 36, 496, 497; Sanchez de Matrimonio, lib. 10, Disput. 12, N.N. 40, 41; Mirror of Justice, ch. 5, sect. 1; Abus, 108, N. 15; T. 18 Edw. II. 620, Nota 1; Fortesc. de Laud. cap. 27; 3 Inst. 210; 2 Hale, P. C. 289, 290; 4 Blackst. Com. 358; 1 Stark. Ev. 559, 573, 574, 558, 3rd ed.; MacNally's Evid. 578, 580; Burnett's *Crim. Law of Scotland*, 522, 523; Dickson, *Ev. in Scot.* 162, 163; 1 Greenl. Ev. §§ 13 a and 34, 7th ed.; Burrill, *Circ. Ev.* 58, 59; D'Aguesseau, "Fragment sur les Preuves en matière Criminelle;" Beccaria, *Dei Delitti e delle Pene*, § 7. To these may be added even the Chinese law, if we may rely on a work entitled "The Chinese," by J. F. Davis, vol. 1, p. 394, A. D. 1836, comprised in "The

Library of Entertaining Knowledge." It is worthy of observation, that although, as appears from some of the above references, the principle in question was fully recognized by the civilians and canonists, they reversed the rule in those cases where innocence chiefly requires protection; and their maxim, "In atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi;" Beccaria, *Dei Delitti e delle Pene*, § 8, in not.; see also Mascard. de Prob. Concl. 1392, N. 13; Burnett's *Crim. Law of Scotland*, 612—will remain a lasting monument of the barbarity as well as the imbecility of its framers. Nor are these merely the notions of by-gone ages. In a very recent treatise on the canon-law is the following passage: "Plus præstant præsumptiones in causis civilibus, quam in criminalibus, in quibus nemo ex solis conjecturis, etiam vehementibus, condemnandus est; excepto crimine hæreseos, cujus suspectus tanquam hæreticus condemnatur, nisi omnem suspicionem excusserit" (*Devotus, Instit. Canon. vol. 2, p. 116, Paris. 1852. Superiorum facultate*)

evidence that would be relevant or even conclusive, where its reception would involve the disclosure of matters of paramount importance, which public policy

The English law goes further in the opposite direction than that of most other countries, for it lays down as a maxim, that it is better several guilty persons should escape than that one innocent person should suffer (2 Hale, P. C. 289; 4 Blackst. Com. 358); the salutary fruit of which is, that in no part of the world is genuine voluntary evidence against suspected criminals more easily procured than in England; the persuasion being general throughout society, that if a suspected man be really innocent, the law will take care that no harm shall happen to him. The principles on which this noble and politic maxim rests are not, however, generally understood. The strongest proof of this is to be found in the singular fact of its having been formally attacked by the celebrated Dr. Paley, in his "Moral and Political Philosophy," bk. 6, ch. 9, who designates it a popular maxim, having a considerable influence in producing injudicious acquittals, and argues thus against it: "The security of civil life, which is essential to the value and the enjoyment of every blessing it contains, and the interruption of which is followed by universal misery and confusion, is protected chiefly by the dread of punishment. The misfortune of an individual, for such may the sufferings, or even the death, of an innocent person be called when they are occasioned by no evil intention, cannot be placed in competition with this object. . . . When certain rules of adjudication must be pursued, when certain degrees of credibility must be accepted, in order to reach the crimes with which the public are infested, courts of justice should not be deterred from the application of

these rules, by every suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect, that he who falls by a mistaken sentence, may be considered as falling for his country; whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upheld." It will not, however, be difficult to expose the fallacy of this pernicious and inhuman argument. It is perfectly true that the security of civil life is the first object of all penal laws, and that that security is chiefly protected by the dread of punishment; but then it is a punishment as a consequence of guilt, and not of punishment falling indiscriminately on those who have or have not provoked it by their crimes. When the guilty escape, the law has merely failed of its intended effect; but when the innocent become its victims, it injures the very persons it was meant to protect, and destroys the security it was meant to preserve. Nor is this all, or even the worst; for it is a great mistake to suppose that the actual wrong and violence done to the innocent man, are the only evils resulting from an erroneous conviction. Confidence in the administration of justice must necessarily be shaken when people reflect, and can truly reflect, that every individual they see condemned to punishment may be in the highest degree unfortunate, and in no degree guilty, his sufferings being inflicted merely as a sacrifice to a supposed expediency. Under such a system, few would care to prosecute for offenses, still fewer to come forward with voluntary testimony against



and social order require to be concealed ; such as secrets of state, communications made in professional confidence, and others. (r)

50. Another great difference between legal and historical evidence lies in the securities for truth, and the sources of danger and deception peculiar to each. Posterity and future ages are not unfrequently spoken of as a tribunal, to whose judgment appeals may be

persons accused or suspected of them. The law might, indeed, sit in terrific majesty, denouncing the severest penalties, and acting on the most sanguinary and strained maxims, but for want of proofs and co-operation on the part of society, those penalties would soon become a dead letter. It requires strong imaginative powers to see an analogy between the fate of a soldier dying in the defense of his country, and that of an innocent victim butchered in cold blood under the name of justice. The one falls with honor, his memory is respected, his family, perhaps, provided for ; while the latter has not even the sad consolation of being pitied, but sees himself branded with public ignominy, and leaves a name which will excite nothing but horror or detestation ; until, perhaps, in course of time, his innocence becomes manifest, only to awaken in all the right-minded portion of the community a feeling of alarm and disgust at the state of insecurity under which they live. "Could the escape of ten of the most desperate criminals," emphatically asks Sir Samuel Romilly, in his "Observations on the Criminal Law of England, &c." Note (D.),—from which some of the preceding remarks have been taken,—'have ever produced as much mischief to society as did the public executions of Calas, of D'Anglade, or of Le Brun ?"—three celebrated cases which occurred in France, and show the fear-

ful state into which the administration of justice had fallen under the ancien régime in that country. But another evil, which seems to have altogether escaped the notice of Dr. Paley, remains to be mentioned. "Instances," observes Sir Samuel Romilly, "have indeed occurred like that of Calas, where a man has been offered up as a sacrifice to the laws, though the laws had never been violated : where the tribunals have committed the double mistake of supposing a crime where none had been committed, and of finding a criminal where none could exist. These, however, are very gross and therefore very rare examples of judicial error. In most cases the crime is ascertained, and to discover the author is all that remains for investigation ; and, in every such case, if there follow an erroneous conviction, a two-fold evil must be incurred, the escape of the guilty as well as the suffering of the innocent. Perhaps amidst the crowd of those who are gazing upon the supposed criminal, when he is led out to execution, may be lurking the real murderer, who, while he contemplates the fate of the wretch before him, reflects with scorn upon the imbecility of the law, and becomes more hardened, and derives more confidence, in the dangerous career on which he has entered." &c. further on this subject, *infra*, bk. 1. pt. 1.

(r) See *infra*, bk. 3, pt. 2, ch. 8.

made from the decisions of the present; and viewed as a figure of speech there is no impropriety in this. But figures must not be mistaken for facts. The tribunal of posterity differs immensely from all others; for it is one of unlimited jurisdiction, both judicial and inquisitorial; it is ever sitting, ever investigating, ever judging; barred by no prescription, bound by no estoppel, and responsible to no human authority. The securities for the truth of the records and traditions of the past, which time has brought down to us, consist in the multitude of sources to which they can be traced, the large number of persons whose interest it has been to preserve them from oblivion and corruption; above all, the permanent effects of events; visible in the shape of monuments and other pieces of real evidence, (s) customs, ceremonies, and the like; and, finally, the actors in the scene having passed away, there is rarely either opportunity or interest to fabricate evidence, in furtherance of their views or justification of their conduct. Now, in the case of a legal investigation before a judicial tribunal, properly so called, all this is reversed. The judge or jury, as the case may be, must decide once for all on such evidence as may come before them; the facts—the *res gestæ* of the dispute—are known but to few, and are matter of interest to fewer; while the parties who are best acquainted with

(s) The following passage is taken from a review in the *Examiner* newspaper of Laing's "Descriptive Catalogue of Impressions from ancient Scottish Seals," December 28th, 1850: "Seals and coins may be considered as bottles filled with memoranda, and cast upon the ocean of time by the earlier mariners, for the use of those who came after them. Their forts, their factories, their light-houses, have many of them disappeared; but the

bottles are perpetually being found after many days. . . . Many an obscure allusion in ancient authors has been illuminated by the pure ray serene emitted by a graven gem. The scholar will often find sermons in these stones, excelling the lucubrations of the commentators no less in clearness than in terseness; and he may sometimes be put right by a *scarabæus*, when a scholiast has failed him."

the truth stand in a hostile position to each other, and have a stake at issue which places them under the strongest temptation to misrepresent it. Hence it is obvious, that without peculiar guarantees for the veracity and completeness of the evidence adduced in courts of justice, they would, when investigating disputed facts, be exposed to the same risks of error as the historian, without the safe-guards which he possesses—in a word, the legislator dealing with judicial evidence, is bound to frame characteristic securities to meet characteristic dangers.

51. This distinction between historical and legal proof may be illustrated by the consideration of derivative, or second-hand, evidence. The infirmity of this kind of proof has been already pointed out, (†) and indeed is one of those self-evident things to which the mind of man at once assents. It is equally clear, that the further evidence is removed from its primary source the weaker it becomes; thus hearsay evidence becomes more suspicious and dangerous according as it is reported at second, third, fourth, or fifth hand. And yet, in inquiring into the events of past ages, it is scarcely possible to move a step without resorting to this kind of evidence. Supposing that the events, sacred and profane, which took place in the first year of the Christian era existed solely in oral tradition, and taking a generation to last thirty years; the account which persons at the commencement of the present century had of these events, would seem to have come to them by hearsay at the sixtieth hand; evidence, the value of which in a court of justice would be rightly estimated at zero, if not below it. And although the fact, that accounts of many of those events have been committed to writing, affords a better secu-

(†) *Supra*, part 1, § 30.

rity for their truth, still the genuineness of the documents in which they are recorded rests, in part at least, on oral tradition. But it is a great mistake to suppose, that the real probative force of the evidence of those facts which we possess in the present century, rises no higher than this reasoning would indicate. The fallacy consists in treating each generation as one single person, by whom a bare relation of the fact has been handed down to the next, instead of as consisting of a number of persons interested in ascertaining its truth; and in wholly overlooking the corroborative proofs supplied by permanent memorials and the acts of men. In short, as a modern historian has well expressed it, (*u*) "The presumption of history, to whose mirror the scattered rays of moral evidence converge, may be irresistible, when the legal inference from insulated actions is not only technically, but substantially, inconclusive."

52. The offering to prove a historical fact by derivative evidence afford, therefore, not the slightest presumption of unfairness; unless when the evidence is, on its face, a substitute for some other which might have been procured. (*x*) But derivative evidence offered in a court of justice, in proof of recent events, by a litigant party whose avowed object is to obtain a decision in his own favor, carries so strong an appearance of fraud, that the laws of most nations either reject it, or look upon it with suspicion. (*y*) The

(*u*) Hallam's Constitutional History of England, vol. 2, p. 106, 7th ed.

(*x*) Gibbon, who was not a lawyer, thus expresses himself in the Preface to the fourth volume of his History of the Decline and Fall of the Roman Empire: "I have always endeavored to draw from the fountain head; my curiosity, as well as a sense of duty,

has always urged me to study the originals; and if they have sometimes eluded my search, I have carefully marked the secondary evidence, on whose faith a passage or a fact were reduced to depend."

(*y*) *Infra*, bk. 1, pt. 2; and bk. 3, pt. 2, ch. 4.

English law in general rejects it; but reverses the rule in many cases where the matter to be proved has taken place so long ago, that the original evidence is manifestly unattainable, and thus far partakes of a historical fact. (*z*)

53. The greatest misconceptions and errors have arisen from confounding legal with philosophical and historical evidence. There is a well-known anecdote of Sir Walter Raleigh, which will serve to illustrate this. While a prisoner in the Tower, composing his *History of the World*, a disturbance arose under his window, and being unable to ascertain its merits through the conflicting accounts which reached him, he is said to have uttered an exclamation against the folly of relying on narrations of the events of past ages, when there is so much difficulty in arriving at the truth of those happening immediately around us. (*a*) But in that investigation he was discharging a quasi-judicial function, without the compulsory powers possessed by courts of justice for extracting truth, and laboring under the further disadvantage of imprisonment; while in dealing with the events of past ages he had the benefit of the securities for historical truth already described. (*b*) Much also of Professor Greenleaf's "Examination of the Testimony of the Four Evangelists by the Rules of Evidence

(*z*) *Infra*, bk. 3, pt. 2, ch. 4. "Witnesses are either ancient or modern, that is, contemporary. . . . Ancient witnesses consist of the poets and other celebrated writers, whose authority for certain facts or opinions are embodied in their immortal works. Thus the Athenians produced the testimony of Homer for their right of dominion over the isle of Salamis, in opposition to the pretensions of the commonwealth of Megara; and in

a recent transaction the citizens of Tenedos pleaded the authority of Periander, the wise Corinthian, in a dispute with the inhabitants of Sigeum concerning their common boundaries, &c. . . . These bear evidence of the past, &c."—Aristotle's *Rhetoric*, bk. 1, ch. 15, as freely translated by Gillies.

(*a*) Barrow's *History of Ireland*, vol. 1, pp. 25, 26.

(*b*) *Supra*, §§ 50, 51.

administered in Courts of Justice" is founded on the same mistake.<sup>1</sup> Nowhere, however, are the conse-

<sup>1</sup> Various versions of this story exist, the one most frequently repeated appearing to be as follows:—Sir Walter was engaged in writing a History of the World during his imprisonment. Standing at a window which commanded the tower court, he saw a courtier cross the pavement, followed by his servant, when suddenly the courtier turned, felled his servant to the earth, and left him dead. Happening to mention the occurrence to a friend, he was assured that the matter was quite the other way; that the servant had in fact killed the courtier. Disputing this state of the case, upon the evidence of his own eyes, he was confronted with such indisputable evidence of the truth of the contradictory version, that he burned his manuscript, declaring that if he could not give an accurate account of what passed under his own eyes, he could not describe occurrences of the years before he was born!

But Judge Greenleaf's work was not an attempt, like Sir Walter's, to accommodate historical evidence to his own impressions, or to later testimony, but to try the case, as it were, upon the documents themselves, by the light of the rules:

I. That every document, apparently ancient, coming from the proper repository or custody, and bearing on its face no evident marks of forgery, the law presumes to be genuine, and devolves on the opposite party the burden of proving it to be otherwise.

II. That in matters of public and general interest all persons must be presumed to be conversant, on the principle that individuals are presumed to be conversant with their own affairs

III. That in trials of fact, by oral testimony, the proper inquiry is, not whether it is possible that the testimony may be false, but whether there is sufficient probability that it is true.

IV. That a proposition of fact is proved when its truth is established by competent and satisfactory evidence, and that in the absence of circumstances which generate suspicion, every witness is to be presumed credible until the contrary is shown, the burden of impeaching his credibility lying on the objector; and that the credit due to the testimony of witnesses depends upon, firstly, their honesty; secondly, their ability; thirdly, their number, and the consistency of their testimony; fourthly, the conformity of their testimony with experience; and fifthly, the coincidence of their testimony with collateral

quences of confounding the two kinds of evidence so visible as in Bentham's work on *Judicial Evidence*. He entertains the most erroneous notions as to the nature and use of the rules which regulate the burden of proof; (c) and seems to consider every issue raised in a court of justice as a philosophical question, the actual truth of which is to be ascertained by the tribunal at any cost; or, should this be impracticable, then that a decision is to be given founded on the best guess that can be made at it. Thus, speaking of the laws which require a plurality of witnesses in certain cases, he says, (d) "Every man is excluded, every man, be he who he may, unless he comes with another in his hand. Two propositions are here assumed; all men are liars and all judges fools. Without the second, the first would be insufficient." The illogical character of this reasoning is obvious at a glance. What the law says in such cases is this—the witness may be a liar, and the judge may be a fool; and the mischief which might be caused by the folly of the one set in motion by the mendacity of the other, would so greatly exceed any advantage that could result from a decision based on their united veracity and wisdom, that for the benefit of the community we arrest the inquiry. Perhaps, however, the most glaring instance of this error is, where he contends with so much earnestness and vehemence, that confidential communications between clients and their legal advisers ought not to be held sacred by law;—an argument founded on the assumption, that the

(c) See 1 Benth. Jud. Ev. 36.

(d) 4 Benth. Jud. Ev. 503. See also 5 Id. 463, 464.

circumstances. The Testimony of the Evangelists, examined by the Rules of Evidence administered in Courts of Justice. By Simon Greenleaf, LL.D. New York: James Cockcroft & Co., 1874, pp. 1-54.

compelling their disclosure would advance the ends of justice, by depriving evil-disposed persons of professional assistance in carrying out unrighteous plans (*e*)—we say “unrighteous,” for to projected violations of the law no professional adviser is expected, or ought for one moment, to render himself party. If, indeed, the existing rule were suddenly altered, and everything hitherto communicated in professional confidence, under the assurance that it would be kept inviolate, were laid open to the view of the courts, much valuable evidence would doubtless be obtained; but the first harvest of this kind would be the last, for in future no such communications would be made, either by honest or dishonest clients. It is difficult to paint in too strong colors the evils of such a state of things. For want of materials on which to form a judgment, legal advice would become of little worth; and for want of materials to prepare it, cross-examination, the most powerful instrument for the extraction of truth, would be converted into a lifeless form. Besides, it is a great mistake to suppose that a man’s case must necessarily be bad as a whole, because there is some weak point in it. Nor is this all. A professional adviser often cannot discharge his functions with effect, unless informed respecting matters connected with, though not constituting, the subject of inquiry; the public disclosure of which might be so injurious, that the client would sooner abandon his action or defense, than even run the risk of such a calamity, by having his counsel or attorney subpoenaed as a witness against him.

54. The securities which have been devised by municipal law, for insuring the veracity and completeness of the evidence given in courts of justice, vary

(*e*) Benth. Jud. Ev. bk. 9, pt. 4, ch. 5, sect. 2.



as might be expected, in different countries, and with the systems of law to which they are attached. Several of those principally relied on by the English law ; such as the publicity of judicial proceedings, the compulsory presence of witnesses in open court, the right of cross-examination, &c., will be considered in their place ; (*f*) for the present we will merely point attention to a few which, either from their value or general adoption, deserve particular notice.

55. To the three sanctions of truth which have been described in the preceding part of this Introduction, (*g*) the municipal laws of most nations have added a fourth ; which may be called the legal, or political sanction, (*h*) and consists in rendering false testimony an offense cognizable by penal justice. The punishment of this offense has varied in different ages and places ; in England, it is a misdemeanor punishable by fine, imprisonment, or penal servitude. (*i*)

56. The next security is a very remarkable one ; and consists in requiring all evidence given in courts of justice to be given on oath—according to the maxim “*In judicio non creditur nisi juratis.*” (*k*) Oaths, however, it is well known, are not peculiar to courts of justice, nor are they even the creatures of municipal law—having been in use before societies were formed or cities built ; and the most solemn acts of political and social life being guarded by their sanction.—“*Non est arctius vinculum inter homines quam jusjurandum.*” (*l*) And, however abused or perverted by ignorance and superstition, an oath has in every age been found to supply the strongest hold

(*f*) *Infra*, bk. 1, pt. 1.

(*g*) *Supra*, pt. 1, §§ 16 et seq.

(*h*) 1 Benth. Jud. Ev. 198, 221.

(*i*) *Infra*, bk. 3, pt. 2, ch. 10.

(*k*) Cro. Car. 64. See also 3 Inst. 79.

(*l*) Jenk. Cent. 3, Cas. 54.

on the consciences of men, either as a pledge of future conduct or as a guarantee for the veracity of narration.

57. An oath is an application of the religious sanction—"Jurare est, Deum in testem vocare, et est actus divini cultus." (*m*) It is calling the Deity to witness in aid of a declaration by man; (*n*) and consequently does not depend for its validity on peculiar religious opinions of the person by whom it is taken. The Roman Emperor, we are told, "*jurejurando quod propria superstitione juratum est, standum rescripit*": (*o*) and Lord Chief Justice Willes, in his celebrated judgment in *Omichund v. Barker*, (*p*) expresses himself as follows:—"Oaths were constituted long before Christianity, were made use of to the same purposes as now, were always held in the highest veneration, and are almost as old as the creation. '*Juramentum nihil aliud est quam Deum in testem vocare*;' and, therefore, nothing but the belief of a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take an oath. We read of them, therefore, in the most early times. If we look into the Sacred history, we have an account in Genesis, ch. 26, v. 28 & 31, and again Gen. ch. 31, v. 53, that the contracts between Isaac and Abimelech, and between Jacob and Laban, were confirmed by mutual

(*m*) 3 Inst. 165. In the laws of some countries witnesses were required to give their evidence fasting. Devot. Inst. Canon. lib. 3, tit. 9, § 12, not. (1).

(*n*) "Le serment est l'attestation de la Divinité à l'appui d'une déclaration de l'homme. Ce témoignage de la croyance des peuples à une justice supreme, se retrouve dans tous les pays et dans tous les temps. Pythagore prétendait même que le monde devait son origine, à un serment que

Dieu lui-même aurait prêté de toute éternité, et dont la création serait l'accomplissement. On sent bien que cette explication, comme la plupart de celles que donne la philosophie sur le mystérieux problème de l'origine du monde, est plus obscure que le fait même à expliquer."—Bonnier, *Traité des Preuves*, § 340, 2nd ed.

(*o*) Dig. lib. 12, tit. 2, l. 5, § 1.

(*p*) Willes, 545, et seq. The case is also reported, 1 Atk. 49, nom. *Omichund v. Barker*.

oaths; and yet the contracting parties were of very different religions, and swore in a different form." The Lord Chief Justice, after citing several passages and examples, both from the Old and New Testament, as well as the ancient heathen poets and authors, together with some modern authorities, and, among others, Grotius, *De Jure Belli ac Pacis*, lib. 2, c. 13, sect. 1, (q) in support of this position, proceeds thus: 'The forms indeed of an oath, have been always different in all countries, according to the different laws, religion, and constitution of those countries. But still the substance is the same, which is, that God in all of them is called upon as a witness to the truth of what we say. Grotius, in the same chapter, sect. 10, says, *forma jurisjurandi verbis differt, re convenit*. There are several very different forms of oaths mentioned in Seldon, vol. ii. p. 1470; (r) but whatever the forms are, he says, that it is meant only to call God to witness to the truth of what is sworn. 'Sit Deus testis,' 'Sit Deus vindex,' or 'Ita te Deus adjuvet,' are expressions promiscuously made use of in Christian countries; and in ours that oath hath been frequently varied, as 'Ita te Deus adjuvet, tactis sacrosanctis Dei evangeliiis;'—'Ita, &c., et sacrosancta Dei evangelia;'—'Ita, &c., et omnes sancti.' And now we keep only these words in the oath, 'So help you God;' and which indeed are the only material words, and which any heathen who believes a God may take as well as a Christian. The kissing the book here, and the touching the Brahmin's hand and foot at Calcutta, and many other different forms which are made use of in different countries, are no part of the oath, but are only ceremonies invented to add the greater

(q) See also Pufendorf, *Jus Nat. et Gent.* lib. 4, c. 2, § 2.

(r) Selden's Works, by Wilkins, in six volumes, A. D. 1726.

solemnity to the taking of it, and to express the assent of the party to the oath when he does not repeat the oath itself; but the swearing in all of them, be the external form what it will, is calling God Almighty to be a witness."

58. There is this important distinction among oaths; that many, besides invoking the attestation of a Superior Power, place in the mouth of the swearer a formula, by which he imprecates divine vengeance on himself if his testimony be untrue. One of the forms in use among the ancient Romans is thus described: "Lapidem silicem tenebant juraturi per Jovem, hæc verba dicentes, 'Si sciens fallo, tum me Diespiter salva urbe arceque bonis ejiciat, ut ego hunc lapidem;'" (s) and formerly an imprecation formed part of the judicial oath in France. (t) Some eminent authorities in our own law, have used language calculated to convey the notion that oaths are necessarily imprecatory. Thus in Queen Caroline's case, (u) Lord Chief Justice Abbott, when delivering the answer of the judges to a question put by the House of Lords, says, "Speaking for myself, not meaning, thereby, to pledge the other judges, though I believe their sentiments concur with my own, I conceive, that, if a witness says he considers the oath as binding upon his conscience, he does, in effect, affirm, that in taking that oath, he has called his God to witness that what he shall say will be the truth, and that he has imprecated the divine vengeance upon his head, if what he shall afterwards say is false." In *Rex v. White*, (x) also, the court said, "An oath is a

(s) Festus, de Verbor. Signif. lib. 10, voc. "Lapidem;" and the custom is alluded to by Cicero, Epist. ad Divers. lib. 7, epist. 1; and by Aulus Gellius, Noct. Attic. lib. 1, c. 21. See

also 1 Greenl. Ev. § 328, note, 7th ed.

(t) Bonnier, *Traité des Preuves*, § 352, 2nd ed.

(u) 2 Brod. & B. 285.

(x) 1 Leach C. L. 430.

religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of Heaven, if he do not speak the truth." Imprecation is, however, no part of the essence of an oath; but is a mere adjunct, of questionable propriety, as calculated to divert attention from the true meaning of the ceremony, and fix it on some external observance. "An oath," says Pufendorf, (*y*) "is a religious asseveration, by which we renounce the divine mercy, or invoke the divine vengeance upon us, unless we speak the truth. That this is the meaning of oaths, is apparent from the forms in which they are usually couched, as, for instance, 'So help me God,' 'God be my witness,' 'God be my avenger,' or equivalent expressions which amount to nearly the same thing. For when we call to witness a superior who has a right to inflict punishment on us, we by this act desire of him to avenge perfidy; and the Being who knows all things is the avenger of crime by the being witness to it. Now the loss of the favor of God is in itself an extremely severe punishment." A modern canonist defines an oath,—"*Affirmatio religiosa, hoc est, advocatio Divini Numinis in testem ejus rei, quæ promittitur aut asseritur;*" (*z*) and the Roman law truly laid down, "*Jurisjurandi contempta religio satis Deum ultorem habet.*" (*a*)

59. The utility of oaths in any shape has been strongly questioned. (*b*) The good man, it is some-

(*y*) *De Jur. Nat. et Gent. lib. 4, c. 2, § 2.* "Est autem jusjurandum assertio religiosa qua divinæ misericordiæ renunciāmus, aut divinam pœnam in nos depocimus, nisi verum dicamus. Hunc enim juramentorum sensum esse, facile indicant formulæ, quibus illa concipi solent; puta, Ita me Deus adjuvet, Deus sit testis, Deus sit vindex, aut his æquipollentes; quæ eodem ferè recidunt. Quando enim

superior puniendi jus habens testis advocatur, simul ab eodem perfidiæ ultio petitur; et qui novit omnia ultor est, quia testis. In hoc ipso autem gravissima pœna est, si quem Deus propitius mortalem non adjuvet."

(*z*) *Devot. Inst. Canon. lib. 3, tit. 9 § 23.*

(*a*) *Cod. lib. 4, tit. 1, l. 2.*

(*b*) *Benth. Jud. Ev. bk. 2, ch. 6.*

times said, will speak the truth without an oath, while the bad man mocks at its obligation. To this, however, the following answer has been given: (c)—“It must be owned great numbers will certainly speak truth without an oath; and too many will not speak it with one. But the generality of mankind are of a middle sort; neither so virtuous as to be safely trusted, in cases of importance, on their bare word; nor yet so abandoned, as to violate a more solemn engagement. Accordingly we find by experience, that many will boldly say, what they will by no means adventure to swear: and the difference which they make between those two things, is often indeed much greater than they should; but still it shows the need of insisting on the strongest security. When once men are under that awful tie, and, as the scripture phrase is, have bound their souls with a bond (Numb. xxx. 2), it composes their passions, counterbalances their prejudices and interests, makes them mindful of what they promise, and careful what they assert; puts them upon exactness in every circumstance: and circumstances are often very material things. Even the good might be too negligent, and the bad would frequently have no concern at all about their words, if it were not for the solemnity of this religious act.” The chief arguments brought against oaths, however, are founded on their abuses. One of the greatest of these is the investing oaths with a conclusive effect—where the law announces to a person whose life, liberty, or property is in jeopardy, that in order to save it he has only to swear to a certain indicated fact. This was precisely the case of the wager of law anciently used in England, (d) and the system of purgation under

(c) Archbishop Secker, as cited in (d) 3 Blackst. Comm. 341.  
Ram on Facts, 211, 212

the canon law. (*e*) So, in the civil law, either of the litigant parties might in many cases tender an oath, called the "decisory oath," to the other who was bound under peril of losing his cause, either to take it, in which case he obtained judgment without further trouble, or refer it back to his adversary, who then refused at the like peril, or took it with the like prospect of advantage. The judge also, (be it remembered there was no jury) had a discretionary power of deciding doubtful cases by means of another oath, called the "suppletory oath," administered by him to either of the parties. (*f*) With reference to these, one of the greatest foreign authorities, who to the learning of a jurist added the practical experience of a judge, expressed himself as follows: (*g*) "I would advise the judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath, to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the

(*e*) *Devot. Inst. Canon. lib. 3, tit. 9, § 26, not. 3*; 4 *Blackst. Comm.* 368.

(*f*) See on the subject of these oaths, *Dig. lib. 12, tit. 2*; *Cod. lib. 1, tit. 1*; *Domat, Lois Civiles, part 1, liv. 3, tit. 6, sect. 6*; 1 *Ev. Poth. Oblig. part 4, ch. 3, sect. 4*; *Bonnier, Traité des Preuves, §§ 338-378, 2nd ed.*; *Calvin Lexic. Jurid. voc. "Juramentum," et "Jurisjur. Usus;" Devot. Inst. Canon. lib. 3, tit. 9, §§ 23 et seq.*

(*g*) 1 *Ev. Poth. § 831*. With the exception of those cases in which a defendant was allowed to wager his

law, abolished by 3 & 4 *Will. 4, c. 42*, the common law of England, as is well known, always rejected the decisory and suppletory oaths of the civilians. In France the decisory oath is not allowed in criminal cases; *Bonnier, Traité des Preuves, § 342, 2nd ed.*, who says, § 360, that its use in such cases may be considered as having completely disappeared among modern nations. Both in France and by the modern canon law, the suppletory oath is confined to civil cases. *Id. § 378*, and *Devot. Inst. Canon. lib. 3, title 9, § 26*.

sanctity of the oath, from persisting in what he had before asserted." Another great abuse of oaths is their frequency. Formerly a system of wholesale swearing pervaded every part of the administration of this country—it was observed, "a pound of tea cannot travel regularly from the ship to the consumer, without costing half a dozen oaths at the least;" (*h*) and nothing was more common than for persons to go before magistrates, and take voluntary oaths on the most trivial occasions. The latter are now prohibited altogether; (*i*) and by several modern statutes, a declaration has been substituted for an oath in many proceedings of an extrajudicial nature. (*k*)

60. Another security for the truth of evidence, and check on the action of fraud and perjury, consists in the establishment by law of prescribed forms, to be observed when pre-appointed evidence is employed. Of these the principal and most universal is that derived from the use of writing. The superiority in permanence, and in many respects in trustworthiness, of written over verbal proofs, must have been noticed from the earliest times—"vox audita perit; litera scripta manet." The false relations of what never took place; and, even in the case of real transactions, the decayed memories, the imperfect recollections and wilful misrepresentations of witnesses; added to the certainty of the extinction, sooner or later, of the primary source of evidence by their death; all show the wisdom of providing some better, or at least more lasting, mode of proof for matters which are susceptible of it, and are in themselves of sufficient consequence to overbalance the trouble and expense of its attainment. "*La force des preuves par écrit,*" says

(*h*) Paley's Moral and Political Philosophy, bk. 3, pt. 1, ch. 16.

(*i*) 5 & 6 Will. 4, c. 62, s. 13.

(*k*) As to promissory oaths, see 31 & 32 Vict. c. 72.



Domat, (*l*) "consiste en ce que les hommes sont convenus de conserver par l'écriture, le souvenir des choses qui se sont passées, et dont ils ont voulu faire subsister la mémoire, soit pour s'en faire des règles, ou pour y avoir une preuve perpétuelle de la vérité de ce qu'on écrit. Ainsi, on écrit les Conventions, pour conserver la mémoire de ce qu'on s'est prescrit en contractant, et pour se faire une loi fixet immuable de ce qui a été convenu. Ainsi, on écrit les Testamens, pour faire subsister le souvenir de ce qu'a ordonné celui qui avait le droit de disposer de ses biens, et en faire une règle à son héritier et à ses légataires. Ainsi, on écrit les Sentences, les Arrêts, les Edits, les Ordonnances, et tout ce qui doit tenir lieu de titre ou de loi. Ainsi, on écrit dans les Registres publics les Mariages, les Baptêmes, les actes qui doivent être insinués; et on fait d'autres semblables registres, pour avoir un dépôt public et perpétuel de la vérité des actes qu'on y enregistre. . . . L'écrit conserve invariablement ce qu'on y confie, et il exprime l'intention des personnes par leur propre témoignage." In accordance with these principles, the policy of the common law of England requires, that the proceedings of parliament and the higher courts of justice, and some other public matters of great weight and importance, shall be preserved in written records; and that many acts, even among private individuals, must be done by deed or writing. Thus, the sale or transfer of a ship, or of any share therein, must be by writing. (*m*) So, the sale or assignment of a copyright, must be by writing. (*n*)<sup>1</sup> So, a lease of any tenements or

(*l*) Domat, Lois Civiles, part 1, liv. 3, tit. 6, sect. 2. See *infra*, bk. 2, pt. 3, ch. 1.

(*m*) 17 & 18 Vict. c. 104, s. 55.

(*n*) 5 & 6 Vict. c. 45; 3 & 4 Will. 4, c. 15; 8 Ann. c. 9.

<sup>1</sup> Morgan on the Law of Literature, vol. i., chapter on Contracts.

hereditaments, for a term of more than three years, must be by a deed. (*o*) So, the promise of a debtor, to pay a debt barred by the Statute of Limitations, is void unless it be made in writing, and be signed by the party chargeable thereon. (*p*) So, by the celebrated statute 29 Car. 2, c. 3,—commonly called “The Statute of Frauds and Perjuries,”—any special promise by an executor or administrator to answer damages out of his own estate; or any special promise by one person to answer for the debt, default, or miscarriages of another; or any agreement made by any person upon consideration of marriage; or any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or any agreement that is not to be performed within the space of one year from the making thereof; must be proved by some memorandum or note in writing, signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized. (*q*) And by the same statute, it is further enacted, (*r*) that “no contract for the sale of any goods, wares, or merchandises, for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.” In many cases also certain forms are superadded to writing. Thus, it is of the essence of a deed that it be

(*o*) 8 & 9 Vict. c. 106, s. 3; 29 Car.  
2, c. 3, ss. 1, 2.

(*p*) 9 Geo. 4, c. 14, s. 1.

(*q*) Sect. 4.

(*r*) Sect. 16 (marked 17 in the ordinary copies).

sealed and delivered: (s)<sup>1</sup> and by the 7 Will. 4 & 1 Vict. c. 26, s. 9 (explained by 15 & 16 Vict. c. 24), a will must be in writing, and executed by being signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature must be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time; and such witnesses must attest and subscribe the will in the presence of the testator. Nor are provisions, such as these, in any way peculiar to our law; for the Jews, the Romans, and the Anglo-Saxons had, and most modern nations have their pre-appointed evidence;—requiring certain acts to be done by writing or in some particular way. (t)

61. As a general rule, when the law prescribes forms for pre-appointed evidence, the non-compliance with them is fatal to the transaction, and the whole becomes a nullity. “Non observatâ formâ infertur adnullatio actûs.” (u) “Forma legalis, forma essentialis.” (x) “Solemnitates legis sunt observandæ.” (y) Bentham recommends that this should be reversed, and that pointed suspicion, not nullification, should be the result; (z) but he admits that nullification is just in certain cases. (a) It is impossible to deny that the principle under consideration may be, and often has been, extended beyond the limits alike of usefulness

(s) 2 Blackst. Comm. 305, 306; Finch, Com. Laws, 24 a.

(t) See a variety of instances collected in Greenleaf's Law of Evidence, vol. 1, § 262, note (1), 7th ed. And for the French Law, see Bonnier, *Traité des Preuves* part 2, liv. 2, 2nd ed.

(u) 5 Co. iv. a; 12 Co. 7. The same

holds in the French law. See Bonnier, *Traité des Preuves*, § 418, 2nd ed.; Domat, part 1, liv. 3, tit. 6, s. 2, § vi.

(x) 10 Co. 100 a.

(y) Jenk. Cent. 1, Cas. 22, and Cent. 3, Cas. 45.

(z) 2 Benth. Jud. Ev. 467, 487, 518.

(a) Id. 470.

<sup>1</sup> Morgan's Addison on Contracts, vol. 1, 24, 25.

and propriety; and the truth and good sense of the entire matter seem contained in the following observations of Sir W. D. Evans: (*b*) "The interest of society is greatly promoted, by establishing authentic criteria of judicial certainty, so far as this object can be effectuated without materially interfering with the claims of general convenience. Where the acts which may become the subject of examination will admit of deliberate preparation, and the purposes of them evince the propriety of a formal memorial of their occurrence, more especially when they are from their nature subject to error and misrepresentation, it is reasonable to expect that those who are interested in their preservation, should provide for it in a manner previously regulated and established, or that, in case of neglect, their particular interest should be deemed subordinate to the great purposes of general certainty. But it is also certain that this system of precaution may be carried too far, by the exaction of formalities, cumbersome and inconvenient to the general intercourse of civil transactions; the special application of these principles must be chiefly governed by municipal regulations; but, as a general observation, it is evident that the great excellence of any particular system must consist in requiring as much certainty and regularity as is consistent with general convenience, and in admitting as much latitude to private convenience, as is consistent with general certainty and regularity. It may be added, that for these purposes every regulation should be attended with the most indisputable perspicuity; and that the established forms should be cautiously preserved from any intricacy or strictness that may tend to perplex and embarrass the subjects which they were designed to elucidate, and to

endanger and destroy the substance which they were instituted to defend."

62. Another plan, resorted to by the laws of most nations for guarding against misdecisions, consists in the repudiation as witnesses of persons whose testimony, either from personal interest in the matter in dispute, or other visible cause, seems likely to prove untrustworthy. This is the *recusatio testis* of the civilians, as distinguished from the *recusatio judicis*, or challenge of the judge, and in our law is called "the incompetency of witnesses." Its policy, however, has been seriously doubted, even fiercely attacked, in modern times; and much has been said and written on both sides of the question. (c) Perhaps the true view of this matter is that the principle of repudiation should, at least in general, be confined to pre-appointed evidence. There is a great difference between the rejection of evidence, and the rejection of witnesses. Evidence may fairly be rejected when it is so remote that, to allow tribunals to act on it, would invest them with dangerous or unconstitutional power; or, when, being derivative instead of original, its very production carries the impress of a fraudulent suppression of better evidence; or when its disclosure would be against public policy. But the testimony of casual witnesses to a fact, *i. e.* of persons who have incidentally witnessed it, comes under none of these heads. Such witnesses are the original depositaries of the evidence; and in many cases the exclusion of their testimony, would be to exclude all attainable evidence on the question in dispute, and to offer, by impunity, a premium to dishonesty, fraud, and crime.<sup>1</sup> If it be

(c) See Benth. Jud. Ev. vol. i. pp. 3, seq., 5th ed.; Ph. & Am. Ev. 43-45; 151, 152; vol. ii. pp. 541, 542, 543, Bonnier, *Traité des Preuves*, §§ 225 and bk. 9, pt. 3; Tayl. Ev. § 1210 et seq., 275 et seq., 2nd ed.

<sup>1</sup> See Judge Appleton's valuable work on the "Principles

said that, owing to personal interest in the matter in question, unsoundness of mind, deficiency of religion, antecedent misconduct, &c., their evidence is likely to prove unsafe; the answer is, that any line drawn on this subject must necessarily be in the highest degree arbitrary. It is impossible to enumerate, *à priori*, the causes which may distort or bias the minds of men, to mis-state or pervert the truth, or to estimate the weight of each of these causes in each individual case or with each particular person. But it is very different with pre-appointed evidence, where parties have the power to select their witnesses, and thus make the original depositaries of the evidence to their acts. To such parties the law may fairly say, "You shall for this purpose select persons who from their station, occupation, or habits, are likely to be of more than ordinary intelligence, knowledge, or trustworthiness: if you do not, you must take the consequences." All this seems a natural and just development of the great principle—in the English law a fundamental one—that requires the best evidence to be given, and is further recommended by being rarely productive of injury or inconvenience. (*d*)

63. But whatever the real value of this plan for securing the trustworthiness of evidence, its abuses have been enormous. In the civil and canon laws, the list of persons liable to be rejected as incompetent to bear testimony, was so large that, if the rules of exclusion had not been qualified or evaded, it is difficult to see how, even with the interrogation of parties and the perilous aid of the decisory and suppletory oaths, jus-

(*d*) See on this subject, bk. 1, pt. 1, and bk. 3, pt. 2.

of Evidence;" and also an opinion of Judge Appleton, in *State v. Cleaves*, 59 Me. 299, quoted *post*, this chapter.

tice could have been administered at all. (*e*) And these very qualifications and evasions gave rise to a still greater evil, which shall be noticed presently. (*f*) In some instances entire classes were rejected, not from any distrust of their veracity, but as a punishment for offenses, or with the view of affixing a stigma on religious or political opinions. The strongest illustration of this is to be found in the celebrated constitution of the Greek emperor: by which Pagans, Manichæans, and members of some other sects, were disqualified from giving evidence under any circumstances; while heretics and Jews were only allowed to do so in causes in which heretics or Jews were parties and, except in some peculiar cases, from necessity, could not bear testimony against orthodox Christians. (*g*) Similar principles prevailed in the canon law,

(*e*) See Dig. lib. 22, tit. 5; Cod. lib. 4, tit. 20; Huberus, Præl. Jur. Civ. lib. 22, tit. 5; Heinec. ad Pand. par. 4, §§ 136-140; Devot. Inst. Canon. lib. 3, tit. 9, §§ 13 et seq, 5th ed.; Decret. Greg. IX. lib. 2, tit. 20. Bonnier, in his *Traité des Preuves*, §§ 225 et seq., considers that the positive rejection of witnesses was rare in the ancient Roman law, and that the complicated system established in Europe was chiefly the work of the middle ages.

(*f*) See *infra*, § 74.

(*g*) Cod. lib. 1, tit. 5, l. 21. We subjoin this constitution entire:—  
“Quoniam multi judices in dirimendis litigiis nos interpellaverunt, nostro indigentes oraculo, ut eis referetur quid de testibus hæreticus statuendum sit, utrumne accipiantur eorum testimonia, an respnantur, sancimus, contra orthodoxos quidem litigantes nemini hæretico, vel his etiam qui Judaicam superstitionem colunt, esse in testimonia communionem: sive

utraque pars orthodoxa sit, sive altera. Inter se autem hæreticis, vel Judæis, ubi litigandum existimaverint, concedimus fœdus permixtum, et dignos litigatoribus etiam testes introducere: exceptis scilicet his, quos vel Manichæus furor (cujus partem et Borboritas esse manifestum est), vel Pagana superstitio detinet: Samaritis nihilominus, et qui illis non absimiles sunt, Montanistis, et Tascodrogitis, et Ophitis; quibus pro reatus similitudine omnis legitimus actus interdictus est. Sed his quidem, id est, Manichæis, Borboritis, et Paganis, necnon Samaritis, et Montanistis, et Tascodrogitis, et Ophitis omne testimonium, sicut et alias legitimæ conversationes sancimus esse interdictum. Aliis vero hæreticis tantummodo judicialia testimonia contra orthodoxos, secundum quod constitutum est, volumus esse inhibita. Cæterum testamentaria testimonia eorum, et quæ in ultimis elogiis, vel in contractibus consistunt, propter utilitatem necessarij usus, eis

(*h*) which also, as might have been expected, rejected the evidence of excommunicated persons, at least when tendered against such as were orthodox. (*i*) Even whole races and nations have occasionally been brought within the pale of exclusion; as in some parts of the West Indies, (*k*) and some of the United States of America, (*l*) where the evidence of a negro slave was not receivable against a free person; and in India, where that of a Hindoo seems not to have been receivable against a Mohammedan. (*m*) The following law of the State of Alabama, passed so late as 1852, carried the matter much further: "Negroes, mulattoes, Indians, and all persons of mixed blood, descended from negro or Indian ancestors, to the third generation included, though one ancestor of each generation may have been a white person, whether bond or free, cannot be a witness in any cause, civil or criminal, except for or against each other." (*n*) Although the English law never went so far in this respect, as those of most other countries, yet even among us the number of grounds of incompetency to give evidence was formerly very considerable. They have been much reduced in modern times, by the decisions of the judges and the interference of the legislature. (*o*)

64. One of the strangest and most absurd applications of this principle was the rejecting, or at least regarding with suspicion, the testimony of women as

sine ulla distinctione permittimus, ne probationum facultas angustetur."

(*h*) Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 19; Ayl. Par. Jur. Can. Angl. 448; Devot. Inst. Canon. lib. 3, tit. 9, § 13.

(*i*) Lancel. in loc. cit.

(*k*) Browne's Civil Law, vol. i. p. 107, note, 2nd ed.; Shephard's Colonial Practice of St. Vincent, 69, 70.

(*l*) Appleton on Evidence, App. 271, 275, 276, 277, 278.

(*m*) See Arbuthnot's Reports of the Foujdaree Udalt, p. 1, and Preface, p. xxiii.; Goodeve, Evid. 113.

(*n*) Appleton, Evid., App. 275, 276.

(*o*) On the subject of the incompetency of witnesses, see bk. 1, pt. 2, and bk. 2, pt. 1, ch. 2.



compared with that of men. The following law is attributed to Moses by Josephus: "Let the testimony of women not be received, on account of the levity and audacity of their sex;" (*p*)—a law which looks apocryphal, (*q*) but which, even if genuine, could not have been of universal application. (*r*) The Hindu code, it appears, rejected their evidence generally, if not absolutely; (*s*) as likewise did the Mohammedan law, in charges of adultery, and in some other instances. (*t*) Nor were these merely Asiatic views. The law of ancient Rome, while admitting their testimony in genera<sup>1</sup>, refused it in certain cases. (*u*) The civil and canon laws of mediæval Europe seemed to have carried the exclusion much further. (*x*) Mascardus (*y*) says, "Feminis plerumque omninò non

(*p*) Joseph. Antiq. Judaic. lib. 4, c. 8, No. 15. Ἰνναίνων δὲ μὴ ἔστω μαρτυρία, διὰ κτηνότητά καὶ θράσους τοῦ γένους αὐτῶν.

(*q*) Independent of the inspiration of the Pentateuch, and its significant silence on the subject, the style of this law is widely different from that of Moses.

(*r*) There is at least one instance in the Pentateuch, where the evidence of a woman was receivable, and this even in a capital case: "If a man have a stubborn and rebellious son, which will not obey the voice of his father, or the voice of his mother, and that, when they have chastened him, will not hearken unto them: then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; and they shall say unto the elders of his city, This our son is stubborn and rebellious, he will not obey our voice; he is a glutton and a drunkard. And all the men of his city shall stone him with stones,

that he die; so shalt thou put evil away from among you: and all Israel shall hear, and fear." Deut. xxi. 18–21. Solomon, also, in his celebrated judgment, 1 Kings, iii. 16 et seq., seems to have made no difficulty about receiving the statements of the two women.

(*s*) See Translation of Pootee, ch. 3, s. 8, in Halhed's Code of Gentoo Laws, and Goodeve, Evid. 87.

(*t*) See Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50; Hamilton's Translation of Hedāya, vol. i. p. 382; Macnaghten's Moohummedan Law, 77; and Arbuthnot's Reports of the Foujdaree Udalt, p. 3.

(*u*) Dig. lib. 22, tit. 5, l. 18.

(*x*) Mascard. de Prob. Concl. 763–765; Lancel. Inst. Jur. Can. lib. 3, tit. 14, §§ 14 and 15; Decret. Gratian. pars 2, causa 33, quæst. 5, c. 17. See also Heinec. ad Pand. pars 4, § 127 (2).

(*y*) Mascardus de Prob. Concl. 763. NN. 2, 3.

creditur, ob id duntaxat, quod sunt feminæ, quæ ut plurimum solent esse fraudulentæ, fallaces, et dolosæ;" and Lancelottus, in his *Institutiones Juris Canonici*, (z) lays down in the most distinct terms, that women cannot in general be witnesses, citing the language of Virgil, "*Varium et mutabile semper femina*," (a)—not the only instance in which poetry has been invoked, to justify maxims and laws indefensible by reason. That these rules were plastic enough, like the other rules of those systems, so as to admit many exceptions, may easily be conceived; (b) but the following extract from the work of an able French jurist of our time, shows how long the principle held its ground on the continent. (c) "After women had been admitted to bear testimony by an ordinance of Charles VI." (of France) "of the 15th Nov. 1394, it was long before their evidence was considered equivalent to that of a man. Bruneau, although a contemporary of Mde. de Sévigné, did not scruple to write, in 1686, that the deposition of three women was only equal to that of two men. At Berne, so late as 1821; in the Canton of Vaud, so late as 1824, the testimony of two women was required to counterbalance that of one man. We will say nothing of the minor distinctions with which the system was complicated, such, for instance, as the principle that a virgin was entitled to greater credit than a widow—*magis creditur virgini quàm viduæ*." In the edition of the *Institutiones Canonice* of Devotus, (d) published at Paris in 1852, it is distinctly stated that, except in a few peculiar instances, women are not competent witnesses in criminal cases. In Scotland also, until the beginning of

(z) Lib. 3, tit. 14, §§ 14 and 15.

(a) *Æn.* 4, 569, 570.

(b) See Mascard, in loc. cit.

(c) Bonnier, *Traité des Preuves*. § 243, 2nd ed.

(d) Lib. 3, tit. 9, § 14.

the 18th century, sex was a cause of exclusion from the witness box, in the great majority of instances. (*e*) Even our old English lawyers occasionally rejected the evidence of women, on the ground that they are frail. (*f*) Sir Edward Coke, (*g*) in the reign of Charles I., without a single note of dissent or disapprobation, writes thus:—"In some cases women are by law wholly excluded to bear testimony; as to prove a man to be a villain, (*h*)—mulieres ad probationem statûs hominis admitti non debent." It seems also that in very early times, their testimony was insufficient to prove issue born alive, so as to entitle a man to be a tenant by the courtesy; (*i*) neither could they prove the summons of jurors in an assize. (*k*)

65. One of the most obvious modes of guarding against misdecision, consists in the exacting a certain number of witnesses or other media of proof. The advantage of a plurality of witnesses consists in this, that a false story runs great risk of being detected by discrepancies in their testimony, especially if they are questioned skillfully and out of the hearing of each other. (*l*) But, however salutary such a rule may be, in countries where mendacity and perjury are so common and notorious as scarcely to be looked upon as crimes, (*m*) and everywhere in some cases of

(*e*) Hume, *Crim. Law of Scotland*, vol. 2, pp. 339, 340; Burnett, *Crim. Law of Scotland*, 388-390; 20 Ho. St. Tr. 44, note.

(*f*) Fitzh. Abr. Villenage, pl. 37; Bro. Abr. Testmoignes, pl. 30.

(*g*) Co. Litt. 6 b.

(*h*) Acc. Fitzh. Abr. Villenage, pl. 37; Bro. Abr. Testmoignes, pl. 30, who refers to a case in the 13 Edw. I.; Britton, c. 31. See, however, the case on the eyre of York, in the 13 Hen. III., cited by Fitzh. Villenage, pl. 43.

(*i*) See Hargrave's Co. Litt. 29 b, note 5.

(*k*) Co. Litt. 158 b.

(*l*) A celebrated application of this principle is to be found in the story of Susannah and the Elders, in the Apocrypha.

(*m*) See the picture drawn by Cicero, in his oration for Flaccus, of the proflicacy of the Greeks in this respect. "In some countries," says Bentham, 3 Jud. Ev. 168-9, "there have been said to exist a sort of houses-of-call o

a serious and peculiar nature, it is certainly not based on any principle of general jurisprudence, and wherever so considered has brought immense evils in its train. (*n*)

66. The law of Moses in certain criminal cases, and the New Testament in certain ecclesiastical matters, required two witnesses; whence the civilians and canonists (the latter at least) inferred a divine command, to exact that number in all cases, both civil and criminal. (*o*) The text of the Imperial Code is positive: "Manifeste sancimus, ut unius omnino testis responsio non audiat, etiamsi præclaræ curiæ honore præfulgeat: (*p*) Sola testatione prolatam, nec aliis legitimis adminiculis causam approbatam, nullius esse momenti certum est." (*q*) And that of the Decretals runs thus: (*r*) "Licet quædam sint causæ quæ plures quam duos exigant testes, nulla est tamen causa, quæ unius testimonio (quamvis legitimo) terminetur." Sometimes even this was insufficient. Five witnesses were required by the imperial law to prove certain

register-offices, for a sort of witnesses of all work, as in London for domestic servants and workmen in different lines, and in some parts of Italy for assassins. Ireland, whether in jest or in earnest, was at one time noted for breeding a class of witnesses, known for trading ones, by a symbol of their trade, straws sticking out of their shoes. Under the Turkish government, it seems generally understood that the trade of testimony exists upon a footing at least as flourishing as that of any other branch of trade." The morals of mediæval Europe are well known to have been very low on this subject; and all accounts agree in describing hardened perjury as still rife throughout the East. As to India, see Goodeve, *Evid.* 238.

(*n*) See *infra*, §§ 69 et seq.

(*o*) See *infra*, bk. 3, pt. 2, ch. 10.

(*p*) Cod. lib. 4, tit. 20, l. 9, § 1.

(*q*) Cod. lib. 4, tit. 20, l. 4. Bonnier, in his *Traité des Preuves*, § 241, 2nd ed., has an able argument, to show that this principle was not established in the Roman jurisprudence until the time of the Lower Empire, and had its origin in the constitution of the Emperor Constantine, Cod. lib. 4, tit. 20, l. 9, § 1, which (Bonnier thinks) converted into a rule of law what had previously been laid down as a matter of advice and caution. See further on this subject, Huberus, *Præl. Jur. Civ. lib.* 22, tit. 3, n. 2. and *infra*, bk. 3, pt. 2, ch. 10.

(*r*) Decretal. Greg. IX. lib. 2, tit. 20, c. 23.

payments; (*s*) the canon law occasionally required five, seven, or more witnesses to make full proof; (*t*) and the number made necessary on criminal charges, brought against persons in office in the church, is almost incredible. (*u*) By the law of Mohammed, a woman could not be convicted of adultery unless on the testimony of four male witnesses; (*x*) and his successor the Caliph Omar decided, with reference to this law, that all circumstantial evidence, however proximate and convincing, was of no avail, and that the four male witnesses must have witnessed the very act in the strictest sense of the word. (*y*)

67. But since evidence may be circumstantial as well as direct, the system would have been imperfect, had not the number of circumstances requisite for

(*s*) Cod. lib. 4. tit. 20, l. 18.

(*t*) Ayl. Par. Jur. Can. Angl. 444; 1 Greenl. Ev. § 260, a, notes, 7th ed.; Evans v. Evans, 1 Roberts, Eqcl. R. 171.

(*u*) Fortescue, in his Treatise de Laud. Leg. Angl. cap. 32 (written before the Reformation), tells us of a "lex Generalis Concilii, qua cavetur, ut non nisi duodecim testium depositione cardinales de criminibus convincantur." Waterhouse, in his Commentary on Fortescue, p. 405, says he is not aware what council is here alluded to, nor have we been able to find it; but he refers to the second council of Rome, under Sylvester, as given in the Concilia of Binius, vol. 1. pp. 315 and 318, the third chapter of which contains as follows:—"Non damnabitur præsul, nisi in septuaginta duobus, neque præsul summus à quoquam judicabitur, quoniam his scriptum est: Non est discipulus super magistrum. Presbyter autem, nisi in quadraginta quatuor testimonia non damnabitur. Diaconus autem cardine constrictis urbis Romæ, nisi in

triginta sex, non condemnabitur. Subdiaconus, acolythus, exorcista, lector, nisi (sicut scriptum est) in septem testimonia filios et uxorum habentes, omnino Christum prædicantes, sicut datur mystica veritas." In the laws of Hen. I. c. 5, also, there is this passage: "Non dampnetur presul nisi in lxxii. testibus; neque presul summus a quoquam judiceter. Presbyter cardinalis nisi in xlv. testibus non dampnabitur; diaconus cardinalis nisi in xxvi.; subdiaconus et infra nisi in vii.; nec major in minorum impetitione dispereat." In the Law Review, vol. i. p. 380, and vol. iv. p. 133, it is stated that by the canon law, in the case of a cardinal charged with incontinence, the plena probatio must be established by no less than seven eye-witnesses; but no authority is cited. See also 1 Greenl. Ev. § 260, a, note (1), 7th ed., and Devot., Inst. Canon. lib. 3, tit. 9, § 9, note 3.

(*x*) Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50. See also Goodeve, Evid. 113.

(*y*) Gibbon, in loc.

conviction been defined with the same logical precision. Three presumptions at least were therefore considered necessary by certain doctors of the civil law ; unless they were extremely strong, in which case two might suffice ; (z) and the Austrian legislature, by a law passed so late as 1833, but now abolished, prohibited in general all condemnation from circumstances, unless there were at least three. The climax of absurdity, however, appears in the code which until recently existed in Bavaria. Having observed that inculpativè circumstances are of three kinds, viz., antecedent to the act, as preparations, threats, &c. ; concomitant, as, in case of homicide, a weapon of the accused, found near the dead body ; and, subsequent, as flight from justice, attempt to suborn witnesses, and the like ; the Bavarian legislature ordained that some circumstances belonging to each class must be proved. (a)

68. There is unquestionably no branch of jurisprudence, whose principles have been so much abused and pushed beyond their legitimate limits as judicial proof, especially with regard to its exclusionary rules. This arises partly from its having been comparatively little understood in former times—the substantive branches of law always coming to perfection before the adjective ;—and partly from artificial rules of evidence being found an excellent shield for acts which it is not desired to suppress, but which it would be unsafe or scandalous to realize. In such cases the prohibiting the act, but requiring for the establishment of it evidence so peculiar, either in quantity or quality, as to render condemnation practically impossible, is the ready de-

(z) Bonnier, *Traité des Preuves*, § 723, 2nd ed.

(a) It is right to mention that the statement here made relative to the

laws of Austria and Bavaria are taken from Bonnier, *Traité des Preuves*, §§ 723 and 727, 2nd ed.

vice of corrupt legislation. Some abuses of judicial evidence have been alluded to in the course of this Introduction ; and we purpose to conclude it by pointing attention to two ; which, owing to their magnitude, their prevalence, and the danger under which all tribunals, especially such as are of a permanent nature, lie from them, deserve particular notice.

69. The first of these has its origin in a natural tendency of the human mind to re-act or turn round on itself, by assuming the convertability of the end with the means used to attain it. As connected with the subject before us, this displays itself in the creation of a system of technical, and as it were mechanical belief, dependent on the presence of instruments of evidence in some given number ; and which has with great truth and power been designated by Bonnier, in his *Traité des Preuves*, (*b*) “*système qui tarifait les temoignages, au lieu de les soumettre a la conscience du juge.*” It is strongly illustrated by the practice of the civil and canon laws on the continent of Europe, thus ably described by the eminent French lawyer just quoted : (*c*) “*The technical rules relative to testimonial proof which were devised, or at least developed, by the doctors of the middle ages, are of two kinds. Some tend to exact absolutely certain conditions, in order that legal conviction may exist, while others still more extravagant, tend to create in certain cases an artificial legal conviction even where real conviction may not exist.*” “*If,*” he adds in another place, (*d*) “*the rule rejecting the testimony of a single witness was not perfectly reasonable, another principle, dangerous in a very different way, was that which, creating a legal conviction*

(*b*) § 109, 2nd ed.

(*c*) *Id.* § 239.

(*d*) Bonnier, *Traité des Preuves*, §

242, 2nd ed. See also 5 Benth. *Jud Ev.* 470, 471.

altogether artificial, established that the concurrent depositions of two unsuspected witnesses, must necessarily induce condemnation. Here the application of the texts of the *Corpus Juris* was completely mistaken; for such a logical error was never professed at Rome, or even at Constantinople." But it was exactly suited to the scholastic and supersubtle spirit of more recent times. The texts of the code and of the decretal being peremptory, that the testimony of one witness could not be acted on under any circumstances, *(e)* and that two were sufficient in all cases where no greater number was expressly required by law; *(f)* the doctors of the civil and canon laws hastily (they perhaps thought logically) inferred, that the deposition of two witnesses who were *omni exceptione majores*, amounted to proof; and bestowed on it the name of full proof—"plena probatio" *(g)*—forgetting that proof means persuasion wrought in the mind, and consequently must depend, not on the number of instruments of evidence employed, but on their force, credibility, and concurrence. Nor was this all. If the testimony of two witnesses made full proof, that of one must be a half proof, which they called "semi-plena probatio;" *(h)* and this arithmetical mode of estimating testimony being once established, it was extended by analogy to presumptive evidence, so that the subtilties of "proof" and "semi-proof" ran through the entire judicial system. Thus admissions extracted by torture

*(e)* Cod. lib. 4, tit. 20, l. 9: "Unius omnino testis responsio non audiat, etiamsi præclaræ curiæ honore præfulgeat."

*(f)* Dig. lib. 22, tit. 5, l. 12: "Ubi numerus testium non adjicitur, etiam duo sufficiunt: pluralis enim elocutio duorum numero contenta est." See

also Heinec. ad Pand. pars 4, § 143.

*(g)* Heinec. ad Pand. pars 4, §§ 118 and 143; Mascard. de Prob. quæst. 11; Ayl. Par. Jur. Can. Angl. 448, 544.

*(h)* Mascard. in loc. cit.; Ayl. Par. Jur. Can. Angl. 444.



(*i*) entries made by tradesmen in their books to the prejudice of other persons, (*k*) an oath to the truth of his demand or defense, administered by the judge to the plaintiff or defendant, (*l*) and occasionally even fame or rumor, (*m*) were recognized as semi-proofs; two such usually constituting full proof. Some of the later civilians, feeling the absurdity of the position, that the probative force of evidence is necessarily represented by unity, zero, or one half, introduced a sub-division of semi-proof into semi-plena major, semi-plena, and semi-plena minor; (*n*) which, in all probability, only served to make matters worse, by rendering the system more technical. And a like rule was sometimes applied to the credit of witnesses. "The parliament of Toulouse," says Bonnier, (*o*) quoting another French author, "has a peculiar mode of dealing with objections; it sometimes receives them according to their different quality, so that they do not destroy the deposition of the witness altogether, but leave it good for an eighth, a quarter, a half, or three-quarters; and a deposition thus reduced in value requires the aid of another to become complete. For example, if on the depositions of four witnesses objected to, two are reduced to a half, that makes one witness; if the third deposition is reduced to a fourth, and the fourth to three-quarters,

(*i*) Mascard, de Prob. Concl. 1392. See also Bonnier, *Traité des Preuves*, § 241, vers. fin., 2nd ed. garici Privati, lib. 3, §§ 98 and 100.

(*k*) Heinec. ad Pand. pars 4, § 134; 1 Ev. Poth. 719. (*o*) Bonnier, *Traité des Preuves*, § 243, 2nd ed. This practice of the parliament of Toulouse is likewise

(*l*) 1 Ev. Poth. §§ 719, 829, 834; Heinec. ad Pand. pars 3, §§ 28, 29. alluded to in Burnett's *Crim. Law of Scotland*, 528. It is worthy of remark, that the same vicious principle was at

(*m*) Mascard. de Prob. Concl. 754, 755; Lancel. Inst. Jur. Can. lib. 3, tit. 14, §§ 1 and 54; Ayl. Par. Jur. Can. Angl. 444. one period creeping into the jurisprudence of the last-mentioned country, which borrowed so much from the civil law. See Hume's *Crim. Law of Scotland*, &c., vol. ii. ch. 10 pp. 293 et seq.; and 19 How. St. Tr. 75 (note).

(*n*) Heinec. ad Pand. pars 4, § 118; Kelemen, *Institutiones Juris Hun-*

that makes another witness, and consequently there is a sufficient proof by witnesses, although all have been objected to, and suffered in some degree from the objections taken."

70. So firmly was this vicious principle worked into the law of France, that, in the great legal reform which took place in that country at the beginning of the present century, it was deemed advisable to take effective measures for its extirpation. With this view the Code Napoleon (*p*) ordained, that in criminal cases a sort of general instruction should be read to every jury by their foreman, before commencing their deliberations, and should also be affixed in large letters in the room whither they retire to deliberate; part of which is as follows:—"La loi ne demande pas compte aux jurés des moyens par lesquels ils se sont convaincus; elle ne leur prescrit point de règles desquelles ils doivent faire particulièrement défendre la plénitude et la suffisance d'une preuve; elle leur prescrit de s'interroger eux-mêmes dans le silence et le recueillement, et de chercher, dans la sincérité de leur conscience, quelle impression on faite sur leur raison les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur dit point, 'Vous tiendrez pour vrai tout fait attesté par tel ou tel nombre de témoins;' elle ne leur dit pas non plus, 'Vous ne regarderez pas comme suffisamment établie toute preuve qui ne sera pas formée de tel procès verbal, de telles pièces, de tant de témoins ou de tant d'indices;' elle ne leur fait que cette seule question, 'Avez-vous une intime conviction?'" This seems running into the other extreme—for it implies, in language at least, that the jury are not confined to the

(*p*) Code l'Instruction Criminelle, liv. 2, tit. 2, ch. 4, sect. 1, § 342.

legal evidence adduced, but are to form their judgment on whatever they know of themselves, or have heard elsewhere, or believe, respecting the matter before them. However this may be, the French civil code containing no analogous provision, Bonnier (in 1843 and 1852) thought it necessary to consider whether in civil cases the two witnesses are still required, or the "intime conviction" is dispensed with; both which points he resolves in the negative. (*q*).

(*q*) Bonnier, *Traité des Preuves*, §§ 201, 202, and 2nd ed. §§ 241, 242. It is but justice to many of the eminent civilians, who in later times commented on the Roman law, to state that they were perfectly alive to the absurdity of this theory of proof and semi-proof. See Huberus, *Præl. Jur. Civ. lib. 22, tit. 3, n. 2*; Heinec. *ad Pand. pars 4, § 118*. It was however so firmly established to be shaken, so that no resource remained but to evade it; and the working of the system has been thus ably exposed:—"In the Roman law, two witnesses are pronounced indispensable. In the penal branch (the higher part at least), what followed? Torture. By fewer than two witnesses a man was not to be consigned to death; but by a single witness he might at all times be consigned to worse than death. If, then, being guilty, he had it in his power to relate and circumstantiate a guilty act, at any time, if he thought fit, he might, at the price of future suffering, release himself from present torments. But if, not being guilty, and in consequence not having it in his power to circumstantiate the guilty act, he had it not in his power to release himself at that price, he was to suffer on perishing or not perishing, under or in consequence of the infliction, as it might happen. Upon

the face of it, and probably enough in the intention of the framers, the object of this institution was the protection of innocence. The protection of guilt, and the aggravation of the pressure upon innocence, was the real fruit of it. In the non-penal branch, the experienced mischievousness of the rule forced men upon another shift, of which, if the mischievousness be not so serious, the absurdity is more glaring. I mean the operation of splitting one man into two witnesses. Proposing to himself to make a customer, or non-customer, pay for what he has had, or not had,—a shopkeeper makes, in his own books, an entry of the delivery of the goods accordingly, and by this entry he makes himself one witness. A suit is then instituted by himself, against the supposed customer, for the value of the goods: he now takes an oath in a prescribed form, swearing to the justness of the supposed debt, and by this oath he coins himself into a second witness, the second witness which the law requires. By the same rule, if three had been the requisite complement of witnesses, two such oaths might have completed it; if four witnesses, three oaths; and so on. With a splitting-mill of such power at his command, a man need never be at a loss for witnesses. In every cause, the plaintiff,

71. The substitution of arithmetic for observation and reasoning, when estimating the value of evidence, is not confined to past ages. Bentham, in his work on Judicial Evidence, proposes a plan so extraordinary that it is but justice to give it in his own words. After observing that a correct mode of expressing degrees of persuasion and probative force is an object of great importance, but that the language current among the body of the people is in this particular most deplorably defective, &c., (*r*) he proceeds thus (*s*) —“Conceive the possible degrees of persuasion, positive and negative together, to be thus expressed: the degrees of positive persuasion—persuasion affirming the existence of the fact in question—constitute one part of the scale, which call the positive part. The degrees of negative persuasion—persuasion disaffirming or denying the existence of the same fact—constitute the other part of the scale, which call the negative part. Each part is divided into the same number of degrees, suppose ten, for ordinary use. Should the occasion present a demand for any ulterior degree of accuracy, any degree that can be required may be produced at pleasure, here, as in other ordinary applications of arithmetic, by multiplying this ordinary number of degrees in both parts by any number,

to gain it, must make full proof (*probatio plena*). The tradesman's books make half a full proof (*probatio semi-plena*): his oath, as above (his supplementary oath, it is called), makes the other half (*Heinec. iv. 134*). Sixteen paragraphs before, in the book of authority, from which, for reference sake, the instance has been taken, the reader has been assured (and that without exception, and in the most pointed terms), that a half full proof, though composed of the testimony, regularly

extracted, of a disinterested witness, of the most illustrious and consequently trustworthy class, goes absolutely for nothing” (5 Benth. Jud. Ev. 481-483). That this statement of the practice of the civilians does not rest on the unsupported authority of Heineccius, see the authorities cited in the notes to the present and preceding articles.

(*r*) Benth. Jud. Ev. vol. i. p. 74.

(*s*) Id. 75-80.

so it be the same in both cases ; the number ten will be found the most convenient multiplier. In this case, instead of 10, the number of degrees on each scale will be 100 or 1000, and so on. At the bottom of each part of the scale stands 0 ; by which is denoted the non-existence of any degree of persuasion on either side ; the state which the mind is in, in the case in which the affirmative and the negative, the existence and the non-existence of the fact in question, present themselves to it, as being exactly as probable the one as the other. Such is the simplicity of this mode of expression, that no material image representative of a scale seems necessary to the employment of it. The scale being understood to be composed of ten degrees—in the language applied by the French natural philosophers to thermometers, a decigrade scale—a man says, my persuasion is at 10 or 9, &c., affirmative, or at 10 or 9, &c., negative, as, in speaking of temperature, as indicated by a thermometer on the principle of Fahrenheit, a man says, the mercury stood at 10 above, or at 10 below, 0. If ulterior accuracy be regarded as worth pursuing; to the decigrade substitute (giving notice) a centigrade scale ; and if that be not yet sufficient, a milligrade. . . . For want of an adequate mode of expression, the real force of testimony in a cause has hitherto been exposed to perpetual misrepresentations. . . . Old measures of every kind receive additional correctness ; new ones are added to the number ; the electrometer, the calorimeter, the photometer, the eudiometer, not to mention so many others, are all of them so many productions of this age. Has not justice its use as well as gas ?”

72. The most singular circumstance connected with this fantastic suggestion is, its being accompanied by an admission that after all the only true scale is an

infinite one, but that that is unfortunately inapplicable. (t) The fallacy of the whole has been thus ably exposed in a note by Dumont, the French translator of Bentham. (u) "I do not dispute the correctness of the author's principles; and I cannot deny that, where different witnesses have different degrees of belief, it would be extremely desirable to obtain a precise knowledge of these degrees, and to make it the basis of the judicial decision; but I cannot believe that this sort of perfection is attainable in practice. I even think, that it belongs only to intelligences superior to ourselves, or at least to the great mass of mankind. Looking into myself, and supposing that I am examined in a court of justice on various facts, if I cannot answer 'yes' or 'no' with all the certainty which my mind can allow, if there be degrees and shades, I feel myself incapable of distinguishing between two and three, between four and five, and even between more distant degrees. I make the experiment at this very moment; I try to recollect who told me a certain fact: I hesitate, I collect all the circumstances, I think it was A. rather than B.: but should I place my belief at No. 4, or No. 7? I cannot tell. A witness who says, 'I am doubtful,' says nothing at all, in so far as the judge is concerned. It serves no purpose, I think, to inquire after the degrees of doubt. (x) But these different states of belief, which, in my opinion, it is difficult to express in numbers, display themselves to

(t) 1 Benth. Jud. Ev. 74, 75, and 100.

(u) We have taken this on the authority of the Editor of Bentham's Jud. Ev. vol. i. pp. 106-8, A. D. 1827. Continental writers, admirers of Bentham's works in general, condemn his thermometer of persuasion. Besides the above note of Dumont, see Bon-

nier, *Traité des Preuves*, § 244, 2nd ed., who calls it a "*testimonio-mètre*," and rather fancifully observes, "*Soumise au scalpel de l'analyse, l'intime conviction se flétrit; de même que les fleurs d'un herbier se dessèchent et perdent leurs vives couleurs.*"

(x) Acc. Domat, pt. 1, liv. 3, tit. 6 sect. 3, § xiv.

the eyes of the judge by other signs. The readiness of the witness, the distinctness and certainty of his answers, the agreement of all the circumstances of his story with each other—it is this which shows the confidence of the witness in himself. Hesitation, a painful searching for the details, successive connections of his own testimony—it is this which announces a witness who is not at the maximum of certainty. It belongs to the judge to appreciate these differences, rather than to the witness himself, who would be greatly embarrassed if he had to fix the numerical amount of his own belief. Were this scale adopted, I should be apprehensive that the authority of the testimony would often be inversely as the wisdom of the witnesses. Reserved men—men who knew what doubt is—would, in many cases, place themselves at inferior degrees, rather than at the highest; while those of a positive and presumptuous disposition, above all, passionate men, would almost believe they were doing themselves an injury, if they did not take their station immediately at the highest point. The wisest thus leaning to a diminution, and the least wise to an augmentation, of their respective influence on the judge, the scale might produce an effect contrary to what the author expects from it. . . . It appears to me, that, in judicial matters, the true security depends on the degree in which the judges are acquainted with the nature of evidence, the appreciation of testimony, and the different degrees of proving power. These principles put a balance into their hands, in which witnesses can be weighed much more accurately than if they were allowed to assign their own value; and even if the scale of the degrees of belief were adopted, it would still be necessary to leave judges the power of appreciating the intelligence and morality of the

witnesses, in order to estimate the confidence due to the numerical point of belief at which they have placed their testimony."

73. The mathematical calculus of probabilities, or "doctrine of chances," has, as is well known, been found of essential service in various political and social matters, apparently unconnected with the exact sciences. The modern system of life insurance, in particular, almost owes its existence to that branch of mathematics. Among other things, the notion presented itself of applying the calculus of probabilities to estimating the value of testimony given in courts of justice (*y*)—an object sought to be accomplished by adapting the established formulæ, which express the probability of the concurrence of independent events, to the probability of the evidence of concurring witnesses or independent facts. But no real analogy exists in this respect between judicial testimony and life insurance, or other matters of a similar nature. In the latter a series of facts and figures, collected by long and accurate observation, and carefully registered, supply data that bring the subject within the range of mathematical analysis, a condition which wholly fails when we attempt to deal practically with the former. (*z*)

(*y*) Laplace, *Essai Philosophique sur les Probabilités*, 5th ed.; Lacroix, *Calcul des Probabilités*, Paris, 1833; Poisson, *Recherches sur la Probabilité des Jugemens en matière civile et en matière criminelle*, &c. Paris, 1837; and the article "Probability" in the *Encyclopædia Britannica*.

(*z*) The fundamental principle on which the calculus of probabilities rests is, that in order to determine the probability of an event, we must take the ratio of the favorable chances or cases, to all the possible cases which in our judgment may occur. Let

$m+n$  be the total number of possible cases, all equally likely;  $m$  represents the number of cases in favor of event A., and  $n$  those of event B.; the probability of event A. will be  $\frac{m}{m+n}$ , and that of B.  $\frac{n}{m+n}$ . It is also evident that unity is the symbol of certitude; for, by hypothesis, one of the events must happen; and adding the probabilities of A. and B., we have  $\frac{m}{m+n} + \frac{n}{m+n} = 1$ . The probability of the concurrence of independent events is, not the sum of their simple probabilities,



Still even here the calculus of probabilities is not without its use. "La plupart de nos jugemens," says one of the most distinguished writers upon it, (a) "étant fondés sur la probabilité des témoignages, il est bien important de la soumettre au calcul. La chose,

but their compound ratio, *i. e.* the product of the probabilities of each considered separately. Thus, if  $\frac{m}{m+n}$  be the probability of event A,  $\frac{m'}{m'+n'}$  that of B,  $\frac{m''}{m''+n''}$  that of C, &c., the probability of their concurrence will be expressed by this formula—

$$\left(\frac{m}{m+n}\right) \left(\frac{m'}{m'+n'}\right) \left(\frac{m''}{m''+n''}\right) \text{ \&c.}$$

When the total number of possible cases, and their ratio to the number of favorable chances, are unknown, still approximate values of the probabilities of events can be obtained, by having recourse to hypotheses framed according to the results of a previous number of trials or observed events.

The calculus of probabilities has been applied to the subject of human testimony, by supposing that, in a certain number of depositions, say  $m+n$ , a witness has told truth in  $m$  cases, and falsehood in  $n$  cases; although, in order to determine with accuracy the probability of the fact to which he deposes, the intrinsic, or a priori probability of that fact itself must be taken into the account. Let there be two witnesses, A. and B.; and suppose that in  $m$  cases A. has spoken truth, and in  $n$  cases falsehood, the analogous numbers in the case of B. being  $m'$  and  $n'$ ; the probability of the truth of the testimony of A. is  $\frac{m}{m+n}$ , and that of B.  $\frac{m'}{m'+n'}$ . So long as it is not known whether they are deposing to the same thing or not, the probability that both are right is  $\frac{mm'}{(m+n)(m'+n')}$ ; but when they agree

about the same thing, the terms  $mm'$  and  $m'n$  belong to impossible cases, and the above expression becomes  $\frac{mm'}{mm'+nn'}$ . By a similar process we shall find, that the probability that the falsehood of their joint testimony is  $\frac{nn'}{mm'+nn'}$ . The same principle can easily be extended to any number of witnesses,  $p$ , so that supposing the probability of the veracity of each to be the same, we shall have  $m=m'$ ,  $n=n'$ , &c., and the expressions last obtained will become  $\frac{m^p}{m^p+n^p}$  and  $\frac{n^p}{m^p+n^p}$ . If instead of witnesses we have circumstances, the probability of any fact, as, for instance, the guilt or innocence of an accused person, is calculated in the same way, treating each circumstance as a testimony, and will be the compound result of the simple probabilities arising from each of those circumstances; though in estimating strictly the probability of guilt resulting from each circumstance, the probability of the truth or falsehood of the witnesses deposing to that circumstance must be taken into the account.

For the deduction of the above formulæ, see the works cited in the last note. The most cursory inspection of these expressions will show how impossible it would be for the practical purposes of justice to assign even approximate values to the quantities  $m$ ,  $m'$ ,  $n$  and  $n'$ , to say nothing of the other probabilities necessary to be computed.

(a) La Place, *ut supra*, p. 137.

il est vrai, devient souvent impossible, par la difficulté d'apprécier la véracité des témoins, et par le grand nombre de circonstances dont les faits qu'ils attestent, sont accompagnés. Mais on peut, dans plusieurs cas, résoudre de problèmes qui ont beaucoup d'analogie avec les questions qu'on se propose, et dont les solutions peuvent être regardées comme des approximations propres à nous guider, et à nous garantir des erreurs et des dangers auxquels de mauvais raisonnemens nous exposent. Une approximation de ce genre, lorsqu'elle est bien conduite, est toujours préférable aux raisonnemens les plus spécieux." The calculus of probabilities has accordingly been applied, in English treatises on evidence, to hypothetical states of facts, to illustrate the value of different kinds of evidence. (*b*)

74. The remaining abuse, if less monstrous than the other, (*c*) is to the full as formidable ; and is sure to be found wherever the rules of evidence are too technical or artificial, and the decision of questions of fact is entrusted to a judge, instead of a jury or other casual tribunal. Although no tribunal could venture systematically to disregard a rule of evidence, however absurd or mischievous—this would be setting aside the law—tribunals may occasionally suspend the operation of such a rule without risk, and even with applause, when its enforcement would shock common sense ; and the upright man who has the misfortune to be judge under such a system, either relaxes the rule in those cases, or carries it out at all hazards under all circumstances. The unjust judge, on the contrary, converts this very strictness of the law into an engine of despotism, by which he is enabled to administer

(*b*) See 1 Stark. Evid. 568, 3rd ed. ;      (*c*) Vide *supra*, § 69 et seq.  
and *infra*, bk. 3, pt 2, ch. 2.

expletive or attribute justice at pleasure; while the world at large see nothing but the exoteric system, little suspecting that there is in the back ground an esoteric system with which only the initiated are acquainted. When a rule of this kind militates against an obnoxious party, the judge declares that he is bound to administer the law as he finds it; that it is not for him to overturn the decisions of his predecessors, or sit in judgment on the wisdom of the legislature: and to blame him for this is impossible. But when the party against whom the rule presses is a favored one—the judge discovers that laws were made for the benefit of men, not their ruin, that technical objections argue an unworthy cause, and that the first duty of every tribunal is to administer substantial justice at any price. The badness of the rule is so evident, that it is difficult to find fault with this either; and by thus shifting the urn from which the principle of his decision is taken, the judge sits, like the fabled Jove, (*d*) the absolute arbiter of almost every case that comes before him. (*e*)

75. We have thus endeavored to explain the principles on which judicial evidence is founded, to demonstrate its utility and necessity, and point out the

(*d*) Διοιοι γάρ τε πίθοι κατακείται  
ἐν Διὸς οὐδὲι

Δώρων, οἷα διδῶσι, κακῶν  
ἕτερος δὲ, εἰῶν.

Ὡ μὲν καμμιξας δῶη Ζεὺς  
τερπικέραυνος,

Ἄλλοτε μὲν τε κακῶ ογε κύ-  
ρεται, ἄλλοτε δ' ἔσθλω, &c.

Il. Ω. 527.

Thus translated by Pope:

Two urns by Jove's high throne have  
ever stood,

The source of evil one, and one of good;  
From thence the cup of mortal man  
he fills,

Blessings to these, to those distribute  
ills, &c.

(*e*) This is what Bentham calls  
"The Double Fountain Principle"  
(Jud. Ev. bk. 8, ch. 23). But how  
strange he could not see that its most  
fatal enemy is a jury; and that it  
must reign supreme under his own  
judicial system, where questions both  
of law and fact would be determined  
by a single judge, with the nominal  
check of appeal to a superior equally  
disposed to apply the principle in  
question?

chief abuses to which it is liable. The peculiar system existing in any particular place, will of course depend much on the substantive municipal law with which it is connected, the customs and habits of society, and the standard of truth among the population. In this it only shares the fate of laws in general: of which it has been truly said, "*Perpetua lex est, nullam legem humanam ac positivam perpetuam esse.*" (*f*) "*Leges naturæ perfectissimæ sunt et immutabiles: Leges humanæ nascuntur, vivunt, et moriuntur.*" (*g*)

(*f*) Bacon, *Max. sub reg.* 19.

(*g*) Calvin's Case, 7 Co. 25, a.

## OBJECT AND DIVISION OF THE WORK

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76. The Judicial evidence of any system of jurisprudence may be defined, as that branch of its adjective law which ascertains the nature, determines the admissibility, controls or modifies the effect of the evidence adduced before its tribunals, and regulates their practice relative to the offering, opposing, and receiving it. Having, therefore, in the Introduction treated of evidence in general, and of judicial evidence as distinguished from it, we proceed to the more immediate object of the present work—the system of judicial evidence established by the common law of England, for the use of its ordinary and regular tribunals, on the trial of facts in question before them—known in practice by the title of “The Law of Evidence.” It is necessary to be thus precise, for several other kinds of evidence are observable in our jurisprudence. By sundry statutes, also, peculiar modes of proof are either prescribed or permitted in certain proceedings.

77. “The Law of Evidence” will be best understood by treating of it under the four following heads :

and the present work is divided into four books accordingly.

1. The English Law of Evidence in general.
2. Instruments of Evidence.
3. Rules regulating the admissibility and effect of Evidence.
4. Forensic Practice and Examination of Witnesses.

# BOOK I.

## THE ENGLISH LAW OF EVIDENCE IN GENERAL.

### *Division of the Subject.*

**78.** This Book consists of two Parts. In the first it is proposed to take a general view of the English law of evidence ; the second will be devoted to the history of its rise and progress, with some observations on its actual state and prospects.

## PART I.

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79. The necessity for judicial evidence, as distinguished from natural or moral evidence, has been shown in the Introduction to this work, to arise out of the nature of municipal law and the functions of judicial tribunals. The limitations which can properly be imposed by municipal law on tribunals investigating facts, were there traced to the following principles. First, The maxim "*Optima est lex, quæ minimum relinquit arbitrio judicis*;" (*a*)<sup>1</sup>—the power of tribunals would be absolute, if bounds were not set to their discretion in declaring facts proved or disproved. Secondly, The necessity for speedy action in tribunals; which renders it part of the duty of the legislator to supply rules for the disposal of all matters which come before them, however difficult or even impossible it may be to get at the truth. Thirdly

(a) *Bac. de Augm. Scient. lib. 8, c. 3, tit. 1, Aphorism. 46.*

<sup>1</sup> That system of law is best which confides as little as possible to the discretion of the judge.—*Broom, Leg. Max. p. 81.*



The evils that would arise from considering only the direct, and disregarding the collateral, consequences of decisions. Lastly, the difference between the investigation of historical truth, and of the facts which come in question in courts of justice,—the characteristic dangers to which the latter is exposed, requiring that characteristic securities should be framed to meet them. It was further shown, that while these principles may be, and frequently have been, overstepped and pushed beyond their legitimate limits, the chief abuses to be guarded against by the legislator in dealing with judicial evidence are twofold. First, the creation of a technical and artificial system of belief, dependent on the presence of evidence in some particular quantity, without regard to its weight and credibility; and, secondly, the establishment of rules too stringent and technical to be always enforced, which a dishonest or prejudiced tribunal would consequently be enabled, without danger to itself, to insist on or relax, according to its interest, pleasure, or caprice.

**80.** The characteristic features of the English system of judicial evidence, like those of every other system, are essentially connected with the constitution of the tribunal by which it is administered; and may be stated as consisting of three great principles. 1. The admissibility of evidence is matter of law, but the weight or value of evidence is matter of fact. 2. Matters of law, including the admissibility of evidence, are proper to be determined by a fixed, matters of fact by a casual, tribunal. 3. In determining the admissibility of evidence, the production of the best evidence should be exacted. We propose to consider these in their order; and will afterwards notice two other remarkable features of our system, less charac-

teristic indeed, but exercising a most powerful influence in extracting truth and securing rectitude of decision; namely, the mode in which evidence is received by our tribunals, and the publicity of our judicial proceedings.

81. The first of the three may be dispatched in a few words; as the least reflection will show how absurd it would be in any legislator to attempt to lay down rules for estimating the credit due to witnesses, or the probability of every fact which may present itself, in the innumerable combinations of nature and human action. (*b*) The reliance to be placed on the statements of witnesses, and the inferences to be drawn from facts proved, must therefore be left for the most part to the sagacity of tribunals. But even here, for the reasons already given, some limits must be imposed; and the same causes which render artificial rules of evidence essential to the administration of justice, show that those rules ought, as far as possible, to partake of the nature of other rules of municipal law. (*c*) And however constituted the tribunal, but

(*b*) The following passage from the Digest is commonly cited in proof and illustration of this:—"D. Hadrianus Vivio Varo Legato provincæ Ciliciæ rescripsit, eum, qui judicat, magis posse scire, quanta fides habenda sit testibus. Verba epistolæ hæc sunt: 'Tu magis scire potes, quanta fides habenda sit testibus: qui, et cujus dignitatis, et cujus æstimationis sint: et qui simpliciter visi sint dicere, utrum unum eundemque meditatum sermonem attulerint; an ad ea, quæ interrogaveras, extempore verisimilia responderint.' Ejusdem quoque Principis extat rescriptum ad Valerium Verum de excutienda fide testium, in hæc verba: 'Quæ argumenta ad quem modum probandæ cique rei sufficiant,

nullo certo modo satis definiri potest: sicut non semper, ita sæpe sine publicis monumentis cujusque rei veritas apprehenditur: alias numerus testium, alias dignitas et auctoritas: alias veluti consentiens fama confirmat rei, de qua quæritur, fidem. Hoc ergo solum tibi rescribere possum summam, non utique ad unam probationis speciem cognitionem statim alligari debere: sed ex sententia animi tui te æstimare oportere, quid aut credas, aut parum probatum tibi opinaris.' Idem Divus Hadrianus Junio Rufino Proconsuli Macedonæ rescripsit, 'testibus se, non testimoniis crediturum.'" Dig. lib. 22, tit. 5. l. 3, §§ 1, 2, 3.

(*c*) Introd pt. 2.

especially when it is of the mixed form that will be described presently, the true line seems to be, that the rules of law on this subject ought in general to be confined to the admissibility of proof, leaving its weight to the appreciation of the tribunal.

82. Secondly, The ordinary common law tribunal for deciding issues of fact, (*d'*) consists of a court composed of one or more judges, learned in the law and armed with its authority; assisted by a jury of twelve men, unlearned in the law, taken indiscriminately from among the people of the county where the venue it laid, and possessing property to a defined amount. No "*recusatio judicis*" is allowed, as far as the court is concerned; but jurors are required to be "*omni exceptione majores*," and may be challenged by the litigant parties for want of the requisite qualifications, as well as for certain causes likely to exercise an undue influence on their decision; in addition to which, persons accused of treason or felony are allowed to challenge peremptorily, without cause, the former as many as thirty-five, the latter twenty, of the panel. The court is charged with the general conduct of the proceedings—it decides all questions of law and prac-

(*d'*) In some few instances the trial was, at common law, by the court without a jury: *i. e.*, trial by the record, inspection, certificate, and witnesses (3 Blackst. Com. 330). The 9 & 10 Vict. c. 95, s. 69, empowers judges of county courts to try questions of fact without a jury, provided neither party to the action requires a jury to be summoned. So the 21 & 22 Vict. c. 27, s. 5 empowered the court of chancery to order any question of fact, arising in any suit or proceeding, to be tried before the court itself, without a jury; so the 17 and 18 Vict. c. 125, s. 1 (as amended by 21 & 22

Vict. c. 74, s. 5), enabled the court or a judge to try causes without a jury, if the parties by consent in writing empowered them to do so: but the verdict was not to be questioned on the ground of its being against the weight of evidence. And now, by the "Supreme Court of Judicature Act, 1873" (36 & 37 Vict. c. 66), Sched., Rule 30:—actions may be tried and heard, either before a judge or judges; or before a judge sitting with assessors; or before a judge and jury; or before an official or special referee, with or without assessors.

tice, including the admission and rejection of evidence; and when the case is ripe for adjudication, sums it up to the jury—explaining the questions in dispute, with the law as bearing on them; pointing out on whom the burden of proof lies; and recapitulating the evidence, with such comments and observations as may seem fitting. Moreover,—as the decisions of tribunals on questions of fact ought to be based on reasonable evidence, and when the facts are undisputed, the decision as to what is reasonable is matter of law, and consequently within the province of the court, (*e*)—it follows that it is the duty of the court to determine whether, assuming all the facts proved by the party on whom the burden of proof lies to be true, there is any evidence on which the jury could properly, *i.e.*, without acting unreasonably in the eye of the law, decide in his favor. And if there be not, then the judge ought to withdraw the question from the jury, and direct a non-suit, if the onus is on the plaintiff; or direct a verdict for the plaintiff, if the onus is on the defendant. (*f*) “Whether there be any evidence, is a question for the judge. Whether sufficient evidence, is for the jury.” (*g*) On the other hand, the decision of the facts in issue is the exclusive province of the jury; who are, therefore, to hear the evidence and the comments made on it, to determine the credit due to the testimony of the witnesses, and to draw all requisite inferences of fact from the evi-

(*e*) *Mitchell v. Williams*, 11 M. & W. 205, 216, per Alderson, B.

(*f*) Per Willes, J., delivering the judgment of the court, in *Ryder v. Wombwell* (in Cam. Scac.) L. R., 4 Ex. 32, 38; and see *Toomey v. The Brighton Railway Company*, 3 C B., N. S. 145; *Cornman v. The Eastern Counties Railway Company*, 5 Jurist,

N. S. 657; *Hodges v. Ancrum*, 11 Exch. 214; *Avery v. Bowden*, 6 E. & B. 962, 973-4; *Hall v. Featherstone*, 4 Jurist, N. S. 813, 814, per Martin, B.

(*g*) *Carpenters' Company v. Hayward*, 1 Dougl. 374, 375, per Buller, J. See also 1 Phil. Ev. 4, 10th ed.; *R. v. Smith, Leigh & Cave*, C. C. 607.

dence. This division of the functions of the judge and jury is expressed by the maxim, "ad quæstionem facti non respondent iudices; ad quæstionem juris non respondent juratores." (*h*) Thus, where the defendant in an action for malicious prosecution, gives evidence to prove reasonable and probable cause, it is for the jury to find the facts; and it is for the judge to decide, as matter of law, whether the facts proved amount to reasonable and probable cause. (*i*) But the above maxim must be taken with these limitations. 1st. Facts on which the admissibility of evidence depends, are determined by the court, and not by the jury. (*k*) Thus, whether a sufficient foundation is laid for the reception of secondary evidence, is for the judge, (*l*) and if the competency of a witness turns on any disputed fact he must decide it. (*m*) So, whether a confession in a criminal case is receivable, (*n*) and whether, on a charge of homicide, a dying declaration was made by the deceased, at a time when he was under the conviction of his impending death, in which case alone it is admissible. (*o*)<sup>1</sup> And it seems

(*h*) This maxim is frequent in our old books; Co. Litt. 155 b, 266, a, 295 b; 8 Co. 155 a; 9 Id. 13 a. 25 a; 11 Id. 10 b; Vaugh. 149, &c., &c.; but many of our readers will probably be surprised to find that it has also been long known on the continent. See Bonnier, *Traité des Preuves*, § 74.

(*i*) *Panton v. Williams* (in Cam. Scac.), 2 Q. B. 169.

(*k*) *Bartlett v. Smith*, 11 M. & W. 483, 485-6, per Parke, B; *Cleave v. Jones*, 7 Exch. 421; *Bennison v. Jewison*, 12 Jur. 485; *Doe d. Jenkins v. Davies*, 10 Q. B. 314; *Corfield v.*

*Parsons*, 1 Cr. & M. 730; *Welstead v. Levy*, 1 Moo. & R. 138; *Boyle v. Wiseman*, 11 Exch. 360.

(*l*) *Bennison v. Jewison*, 12 Jur. 485, per Alderson, B.

(*m*) *Bartlett v. Smith*, 11 M. & W. 483, 486, per Parke, B.; *R. v. Hill*, 2 Den. C. C. 254.

(*n*) *R. v. Warringham*, 2 Den. C. C. 447, note; 15 Jur. 318.

(*o*) *Reg. v. Jenkins*, L. Rep., 1 C. C. 187; *Bartlett v. Smith*, 11 M. & W. 483, 486, per Parke, B.; *Bennison v. Jewison*, 12 Jur. 485, per Alderson, B.

<sup>1</sup> *State v. Hanna*, 10 La. Ann. 131; and this, although the accused was not present when the declarations were made (*People v. Green*, 1 Denio, 614; *State v. Brunelto*, 13

the better opinion that, for the purpose of determining such collateral questions, the judge is not re-

La. Ann. 45). These declarations, however, must be made under a sense of impending dissolution (*Commonwealth v. Densmore*, 12 Allen, 535); though even a faint hope of recovery has been held to exclude them (*People v. Anderson*, 5 Wheel. C. C. 398; but see *Jackson v. Commonwealth*, 19 Gratt. 656; *State v. Moody*, 2 Haywood, 31; *State v. Mendicott*, 8 Kan. 257; and the English case of *Rex v. Jonkins*, 11 Cox, C. C. 250). They need not be made immediately preceding death (*Commonwealth v. Cooper*, 15 Allen, 495; *State v. Oliver*, 4 Houst. 585; 1 Greenl. on Ev. § 158; *McDaniel v. State*, 8 S. & M. 490; *State v. Poll*, 1 Hawks. 442; and see *State v. Freeman*, 1 Spears, 57; *Commonwealth v. Cooper*, 5 Allen, 495). It has been held in England, that it would make no difference whether or not the attending physician had hopes of the patient's recovery (*Rex v. Mosley*, 1 Moody, 97; *Rex v. Peel*, 2 F. & F. 21). Whether one believes himself to be at the point of death may be inferred from circumstances (See *Montgomery v. State*, 11 Ohio, 424; *Anthony v. State*, 7 Meigs R. 265; *People v. Grunzig*, 1 Parker C. R. 299; *People v. Knickerbocker*, Id. 302; *Hill's Case*, 2 Gratt. 594; *Nelson v. State*, 7 Humph. 441; *Brakefield v. State*, 1 Sneed (Tenn.) 215; *Morgan v. People*, 31 Ind. 193; *People v. Perry*, 8 Abb. (N. Y.) Pr. N. S. 27; *Kilpatrick v. Commonwealth*, 7 Casey, 198; *Murphy v. People*, 37 Ill. 477; *Commonwealth v. Williams*, 2 Ashm. 69; *Lewis v. State*, 9 Sm. & M. 115). And the reaffirmance, under a sense of impending dissolution, of prior declarations will have the weight of dying declarations (*Young v. Commonwealth*, 2 Bush (Ky.) 312). But where an attorney asked questions of a dying man, and the latter's attempts to answer were "explained by friends to the attorney, who wrote them down, and read what he had written to the dying man, who nodded his head," it was not held to be a dying declaration (See *McHugh v. State*, 31 Ala. 317; *Barnett v. People*, 54 Ill. 324; *Young v. Commonwealth*, 6 Bush. (Ky.) 312; *State v. Shelton*, 2 Jones (Law) N. C. 360; *Hudson v. State*, 3 Cold. (Tenn.) 355; *Hackett v. People*, 54 Barb. 370; *Anderson*, in re, 20 Up. Can. Q. B.—; *R. v. Peltier*, 4 Low. Can. R. 3; *Wilson v. Boerum*, 15 Johns. 286; *Wooten v. Wilkins*, 39 Ga. 223; *State v. Fitzhugh*, 2 Oregon, 227; *State v. Wilson*, 23 La. Ann. 558). The sense of impending dissolution, however, must be so solemn as to preclude the probability of malice (*Montgomery v. State*, 11 Ohio. 424; *Dunn v. State*, 2 Pike,

stricted to legal evidence. (*p*) 2nd. The jury thus far incidentally determine the law, that their verdict is usually general, *i.e.* guilty, or not guilty, for the plain-

(*p*) *Duke of Beaufort v. Crawshay*, H. & R. 638, and cases cited.

229; *State v. Poll*, 1 Hawks. 442). For, as says Wharton on Homicide (§ 746, which see), we must be careful not "to substitute the death-bed for the witness-box, and to make the dying hour the period when all persons knowing anything about a case should be interviewed on the subject" (*Commonwealth v. Williams*, 2 Ashm. 69; 1 Greenl. on Ev. § 158; 2 Russ. on Cr. 752; *Hill's Case*, 2 Gratt. 594; *Nelson v. State*, 7 Humph. 542; *Moore v. State*, 12 Ala. 764; *Blakefield v. State*, 1 Sneed, 215; *Starkey v. People*, 17 Ill. 17; *Robbins v. State*, 8 Ohio St. R. N. S. 131; *Brown v. State*, 32 Miss. (3 Georg.) 433; *Kilpatrick v. Commonwealth*, 7 Casey, 198; *Commonwealth v. Densmore*, 12 Allen, 535; *Dixon v. State*, 13 Flor. 636; *Commonwealth v. Britton*, 1 Legal Gaz. R. 513; *State v. Simon*, 50 Mo. 746). And the constitutional provision, that the accused shall be confronted by the witnesses against him, does not abrogate the common-law principle, that declarations in extremis are admissible (*Woodorder v. State*, 2 How. (Wis.) 655; *Anthony v. State*, 1 Meigs, 245; *Campbell v. State*, 11 Ga. 355; *Robbins v. State*, 8 Ohio St. R. N. S. 131; *State v. Nash*, 7 Iowa, 347; *Miller v. State*, 25 Wis. 384). In all other respects dying declarations will be construed by the rules of evidence. For instance, they may be received either for or against the accused (*United States v. Taylor*, 4 Cranch, C. C. 388; *Moore v. State*, 12 Ala. 764). They must relate to the *res gestæ* (*Johnson v. State*, 17 Ala. 618; *Ben v. State*, 37 Id. 103; *State v. Shelton*, 2 Jones, N. C. 360; *Leiber v. State*, 9 Bush. 11; *Nelson v. State*, 7 Humph. 542; *Mose v. State*, 35 Ala. 421; but see *Donelly v. State*, 2 Dutch. (N. J.) 463, 601; *Same v. Same*, 2 Dutch. 496; *State v. Wilson*, 23 La. Ann. 558; *State v. Terrell*, 12 Rich. (S. C.) 321; *R. v. Baker*, 2 M. & R. 53; *Brown v. Commonwealth*, 73 Pa. St. 321; *State v. Fitzhugh*, 2 Oregon, 227; *Hudson v. State*, 3 Cold. (Tenn.) 355; *Hackett v. People*, 54 Barb. 370). Though the admissibility of such declarations as evidence, and not as dying declarations, will of course depend upon the ordinary rules of evidence (*Commonwealth v. McPike*, 3 Cush. 181; *Same v. Hackett*, 2 Allen, 136; *State v. Porter*, 34 Iowa, 131; *State v. Wagner*, 61 Me. 178; *Denton v. State*, 1 Swan (Tenn.) 279). They must be subject to qualification by evidence as to the

tiff, or for the defendant—such a verdict being manifestly compounded of the facts, and the law as applicable to them. But although the jury have always a mental capacity of the person making them (*Donelly v. State*, 2 Dutch. (N. J.) 6013); or to objections as to incompetency, if by persons who cannot testify against each other, as husband and wife (*Moore v. State*, 2 Ala. 764); or for other objections, e.g., as infancy (*Rex v. Pike*, 3 C. & P. 598; but see *Rex v. Perkins*, 2 M. C. C. 135; S. C., 9 C. & P. 395). That the person was an infidel (*Goodal v. State*, 1 Oreg. 333; but see *People v. Sanford*, 43 Cal. 29); or infamous (*Drummond's Case*, 1 Leach, 337); or mentally incapable (*Commonwealth v. Casey*, 11 Cush. (Mass.) 417; *Donelly v. State*, 2 Dutch. 496); or if the statement was mere matter of opinion (*State v. Williams*, 68 N. C. 62; but see *Wroe v. State*, 20 Ohio St. 460); or if contradictory (*McPherson v. State*, 9 Yerger, 279; *People v. Lawrence*, 21 Cal. 368; *People v. Knapp*, 1 Edm. (N. Y.) Sel. Cas. 177; *Commonwealth v. Lenox*, 3 Brewster, 249; *Hurd v. People*, 25 Mich. 405; *People v. Knapp*, 26 Id. 142; but see *Wroe v. State*, 20 Ohio St. R. 460); or if disconnected and fragmentary (*Wroe v. State*, *ubi supra*; but see *Vass v. Commonwealth*, 3 Leigh, 786; *State v. Patterson*, 45 Vt. 308); or the deceased's character and reputation for truth may be impeached (*People v. Knapp*, 1 Edm. Sel. Cas. 177; but see *Carter v. People*, 2 Hill, (N. Y.) 317; *Nesbitt v. State*, 13 Ga. 235; *Donelly v. State*, 2 Dutch. 496); or for inaccuracy (*Commonwealth v. Cooper*, 5 Allen (Mass.) 495); and the credibility of the declaration is a question for the jury (*Moore v. State*, 12 Ala. 764; *Starkey v. People*, 17 Ill. 7); its admissibility one for the court (*Donelly v. State*, 2 Dutch. (N. J.) 463, 601; *Johnson v. State*, 47 Ala. 9; *McDaniel v. State*, 8 S. & M. 401; *Hill's Case*, 2 Gratt. 594; *People v. Glenn*, 10 Cal. 32; *Starkey v. People*, 17 Ill. 17; *State v. Poll*, 1 Hawks, 442; *Lambeth v. State*, 23 Miss. 322; *Commonwealth v. Murray*, 2 Ashm. 41; *State v. Williams*, 68 N. C. 62; *Dixon v. State*, 13 Fla. 636; contra, *Campbell v. State*, 11 Ga. 354). It has been held, however, that evidence as to the malice borne by the person making the declaration against the accused is not admissible (*State v. Varney*, 8 Boston, L. R. 542). The substance of dying declarations is admissible in evidence, through the medium of interpreters (*Starkey v. People*, 17 Ill. 17; *Montgomery v. State*, 11 Ohio, 424; *Ward v. State*, 8 Blackford, 101; *Nelms v. State*, 3 Sm. & M. 500). If the dying declarations were reduced to writing, the document itself must be produced as the best evi-



right to find a verdict in this form, yet if they feel any doubt about the law, or distrust their own powers of applying it, they may find the facts specially, and leave the court to pronounce judgment according to law on the whole matter. (q)<sup>1</sup>

Errors committed by the court, either in matters of law or in admitting or rejecting evidence, and occasionally even in matters of practice, are corrected by application to a superior tribunal. (r) And if a jury misconduct themselves so as to defeat justice, as for instance, if they determine by lot what verdict to give, or, before giving it, hear other evidence besides that which was adduced in open court, their verdict will be avoided. In civil cases, moreover, the court will grant a new trial, wherever they are satisfied that the verdict of the jury is in contravention of the law, whether the error has arisen from a mere misapprehension of the law by the jury, (s) or their verdict is "perverse," *i. e.* where there is no dispute as to the facts, and the jury, disregarding the direction of the judge, have taken the exposition of the law into their own hands. (t) So if they find a verdict against the

(q) See on this subject, Litt. sects. 366, 367, 368; Co. Litt. 226 b, and 228 a; Hargrave's note 5) to Co. Litt. 155 b; Finch, Law, 39; 3 Blackst. Com. 377, 378; 4 Id. 361; and 32 Geo. 3, c. 60.

(r) But by the "Supreme Court of Judicature Act, 1873" (36 & 37 Vict. c. 66), Sched., Rule 48, "A new trial shall not be granted, on the ground of misdirection, or the improper admission or rejection of evidence, unless in

the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action."

(s) Per Lord Abinger, C. B., *The Att.-Gen. v. Rogers*, 11 M. A W. 670, 673.

(t) *Id.*; and see *Mould v. Griffiths* 8 Jurist, 1010, per Parke, B.; *Saunders v. Davies*, 16 Jur. 481, per Pollock, C. B.; *Hawkins v. Alder*, 18 C. B. 640, per Jervis, C. J.; *King v.*

dence; the whole of the document is to be read, and unless it be lost no parol evidence of its contents is admissible (See *Beets v. State*, 1 Meigs, 106; *State v. Ferguson*, 2 Hill, 619; *State v. Martin*, 30 Wis. 216; *State v. Patterson*, 45 Vt. 308).

evidence, *i. e.* a verdict not merely erroneous in the judgment of the court above, but so unequivocally against the weight of evidence that it ought not to be allowed to stand. (*u*) New trials are also sometimes granted, when a party has been taken by surprise at the trial, or has discovered important evidence, unknown to him at the time it took place; (*x*) and on some other grounds to which it is unnecessary to refer. In criminal cases, generally speaking, points of law must be reserved by the judge, and new trials are not grantable.

83. Having given this sketch of the course of "trial by judge and jury," we should here dismiss the subject, were not a clear perception of the principle on which it is founded, indispensable to a right understanding of our rules of judicial evidence. Looking at the different sorts of tribunals which have existed in different ages and countries, we shall find this distinction running through them, *viz.*, that some are fixed and some casual. (*y*) By "fixed" tribunals are meant those composed of persons appointed, either permanently or for a definite time, to take cognizance of causes of a specified kind; and they most usually consist of men who have made legal matters the subject either of their study or practice: "casual" tribunals are called together for the occasion and dismissed when the cause is decided; and properly should consist of private individuals, possessed of no peculiar legal knowledge. Now, each of these has its advantages and disadvantages. For the decision of questions

Poole, *Ca. Temp.* Hardw. 23, 26, per Hardwicke, C. J.

(*u*) "The discretion of the court to grant a new trial must be a judicial, and not an arbitrary discretion;" per Glyn, C. J., in *Wood v. Gunston*, Sty.

466. See also *Creed v. Fisher*, 9 Exch. 472.

(*x*) See 2 Chit. Archb. 11th ed., 1515, 1516.

(*y*) Paley's *Moral and Political Philosophy*, bk. 6, ch. 8.

of abstract law, the superiority of a fixed tribunal is too obvious to need remark; and even for questions of fact, a superior education, and most probably a higher order of intellect, and a practical acquaintance, from the experience of years, with men in general, with the tricks of witnesses, and the sophistries of advocates, might seem at first sight almost equally decisive in its favor. To this may be added, that the single judge seems the natural and primitive form of tribunal, (*z*) as autocracy seems the natural and prim-

(*z*) Whether it is the most general may be questioned. In the early stages of society, and indeed in all countries on peculiar emergencies, causes are decided by persons of station and authority without reference to any supposed special qualification on their part: it is only as civilization advances and laws become more complicated, that the study and application of them assume the form of a distinct profession. Among the Jews, criminal cases, at least, were tried by the elders of the city, at its gate (See Deut. xxi. 19, &c., xxii. 15, xxv. 7; Ruth, iv. 1-11; Josh. xx. 4; Jerem. xxvi. 10, &c.; Amos, v. 10-15, &c.). And the practice of the two greatest nations of antiquity is thus stated by one of the greatest of historians: "The free citizens of Athens and Rome enjoyed, in all criminal cases, the invaluable privilege of being tried by their country. . . . The task of convening the citizens for the trial of each offender became more difficult, as the citizens and the offenders continually multiplied; and the ready expedient was adopted of delegating the jurisdiction of the people to the ordinary magistrates, or to extraordinary inquisitors. In the first ages these questions were rare and occasional. In the beginning of the seventh century of Rome they were made perpet-

ual. . . . By these inquisitors the trial was prepared and directed; but they could only pronounce the sentence of the majority of judges, who with some truth, and more prejudice, have been compared to the English juries. To discharge this important though burdensome office, an annual list of ancient and respectable citizens was formed by the prætor. After many constitutional struggles, they were chosen in equal numbers from the senate, the equestrian order, and the people; four hundred and fifty were appointed for single questions; and the various rolls or decurias of judges must have contained the names of some thousand Romans, who represented the judicial authority of the state. In each particular cause, a sufficient number was drawn from the urn; their integrity was guarded by an oath; the mode of ballot secured their independence; the suspicion of partiality was removed by the mutual challenges of the accuser and defendant. . . . In his civil jurisdiction, the prætor of the city was truly a judge, and almost a legislator; but as soon as he had prescribed the action of law, he often referred to a delegate the determination of the fact. . . . But whether he acted alone, or with the advice of his council, the most absolute powers might be trusted to a

itive form of government. But, as was said by the great Athenian legislator with reference to the latter, (a)—“Absolute monarchy is a fair field, but it has no outlet,” (b) so the evils necessarily incident to the former immensely outweigh its value. Even as regards accuracy of decision, the advantage in deciding facts is on the side of the casual tribunal. From their position in life its members are likely to know more of the parties and witnesses, and are consequently better able to enter into their views and motives; and from the novelty of their situation they bring a freshness and earnestness to the inquiry, which the constant habit of deciding, adjudicating, and punishing, fades and blunts more or less in the mind of every judge. But the great danger of a fixed tribunal is methodical or artificial decision—a sort of decision by routine, arising out of the faculty of generalizing, classifying, and distinguishing, which is so valuable in the investigation of questions of mere law. This is

magistrate who was annually chosen by the votes of the people. The rules and precautions of freedom have required some explanation; the order of despotism is simple and inanimate. Before the age of Justinian, or perhaps of Dioclesian, the decurias of Roman judges had sunk to an empty title; the humble advice of the assessors might be accepted or despised; and in each tribunal the civil and criminal jurisdiction was administered by a single magistrate, who was raised and disgraced by the will of the emperor” (Gibbon, *Decline and Fall of the Roman Empire*, ch. 44, vers. finem. See also Heinecc. ad Pand. pars 2, § 2; Plutarch, in Vit. Solon). The ancient Germans appear to have had a system strongly resembling our own (Savigny, *Gesch. des Römischen Rechts in Mittelalter*, 1 Band, 4 Kap.,

Id. *System des heutigen Römischen Rechts*, 1 Buch, 3 Kap.; Colquhoun's *Summary of the Roman Civil Law*, pt. 1, § 119); and it seems that, for the mode of trial by a single judge so long prevalent on the continent of Europe, we are chiefly indebted to the lower empire, whose practice the civilians and canonists copied, perhaps extended, in preference to that of Athens, and of Rome before she lost her liberties.

(a) *Πρὸς τοὺς φίλους εἶπεν (ὡς λέγεται) καλὸν μὲν εἶναι τὴν τυραννίδα χωρίον, οὐκ ἔχειν δὲ ἀπόβασιν.* Plutarch, in Vit. Solon.

(b) In modern times it has been compared to a high-pressure steam engine without a safety-valve. See letter signed “An Hertfordshire Incumbent,” *Times*, June 23, 1860.

clearly stated by the Marquis Beccaria, whose testimony is the more valuable from being that of a foreigner. (c) "I deem that the best judicial system, which associates with the principal judge assessors, not selected, but chosen by lot; for, in such matters, ignorance which judges by sense, is safer than science which judges by opinion. Where the law is clear and precise, the duty of the tribunal is limited to ascertaining the existence of facts; and although, in seeking the proofs of crime, ability and dexterity are required; although, in summing up the result of those proofs, perspicuity and precision are indispensable, still, in order to draw a conclusion from them, nothing more is required than plain ordinary good sense—less fallacious than the learning of a judge accustomed to seek the proofs of guilt, and who reduces everything to an artificial system formed by study." And here it is essential to remember that the consequences of the errors of the casual tribunal are immensely less. Theirs are mostly errors of impulse, and their consequences are almost entirely confined to the actual case in which they are committed. The errors of a fixed tribunal, on the contrary, are the errors of system, and their effects are lasting and general. Their decisions, proceeding as they do from persons in authority, will, especially if ever so slightly involving a point

(c) "Io credo ottima legge quella, che stabilisce assessori al giudice principale, presi dalla sorte, e non dalla scelta; perchè in questo caso è più sicura l'ignoranza che giudica per sentimento, che la scienza che giudica per opinione. Dove le leggi sono chiare e precise, l'ufficio di un giudice non consiste in altro che di accertare un fatto. Se nel cercare le prove di un delitto richiedesi abilità e destrezza, se nel presentarne il risultato

è necessario chiarezza e precisione; per giudicarne dal risultato medesimo, non vi si richiede che un semplice ed ordinario buon senso, meno fallace che il sapere di un giudice assuefatto a voler trovar rei, e che tutto riduce ad un sistema fattizio adottato da'suoi studj." Beccaria, *Dei Delitti e delle Pene*, § 7. See also the observations of Abbott, C. J., in *R. v. Burdett*, 4 B. & A. 95, 162, and Paley's *Moral and Political Philosophy*, bk. 6, ch. 8.

of law, be reported, or, what is even more objectionable, remembered without being reported, and form precedents by which future tribunals will be swayed. Nor is even this the worst—the judge to whom the precedent made by his predecessor is cited, is safe from censure if he follows it; while on the other hand, being erroneous in itself, he may without danger disregard it: so that, if corrupt or prejudiced, he may take as his guide either the true principles of proof or the previous wrong decision, and thus give judgment for the plaintiff or for the defendant at pleasure. (*d*)

84. But the invincible objection to fixed tribunals, —*i.e.* fixed tribunals entrusted to decide both law and facts,—exists in the difficulty, not to say impossibility, of keeping them pure, when the questions at issue are of great weight and importance. The judge's name being known to the world, indicates to the evil-disposed litigant the person to whom his bribe can be offered, or on whose mind influence may be brought to bear; and a frightful temptation is held out to the executive, to secure the condemnation of political enemies, by placing on the seat of justice persons of complying morals or timorous dispositions. We commonly hear the purity of the British Bench ascribed exclusively, or nearly so, to the statutes 12 & 13 Will. 3, c. 2, s. 3, and 1 Geo. 3, c. 23, which rendered judges irremovable at the pleasure of the crown; not remembering that, however valuable those enactments are on many grounds, appointment to the bench is as much in the hands of the crown as ever it was; and that even under the old system men were found, like Gascoigne, Hale, and others, who defied the crown when in the discharge of their duty. But where, as among us, the ultimate fate of every case is pronounced by a body,

(*a*) Introd. § 74.

the individual members of which are unknown until the moment of trial, all this is removed ; and in modern times it is the packed jury, not the corrupt judge, which upright citizens have to dread.

85. The description already given of our common-law tribunal shows it to be one of a compound nature—partly fixed and partly casual—and which will be found so constructed, as to secure very nearly all the advantages of each of the opposing systems, while it avoids their characteristic dangers. (*e*) Our system, by confiding to the judge the decision of all questions of law and practice, secures the law and the practice from being altered by any mistake, or even misconduct, of the jury ; by treating as matter of law, and consequently within the province of the judge, the admissibility of evidence, and the sufficiency as a legal basis of adjudication, of any evidence that may be received, it prevents the jury from acting without evidence, or on illegal evidence ; and by entrusting the judge with the general oversight of the proceedings and the duty of commenting upon the evidence, it renders available his knowledge and experience. But by taking out of the hands of the judge the actual decision on the facts and the application of the law to them, it cuts up mechanical decision by the roots, prevents artificial systems of proof from being formed, and secures the other advantages of a casual tribunal. Besides, the difference that exists between the judge and jury, in station, acquirements, habits, and manner of viewing things, not only enables them to exert on each other a mutual and very salutary control, but confers an enormous moral weight on their joint action. When, for instance, the condemnation of a criminal is pronounced, both by the representative of the law, and

(*e*) Paley's Moral and Political Philosophy, bk. 6, ch. 8.

by a number of persons chosen indifferently from the body of the community, the blow descends on him and the other evil-disposed members of it, with a force which it never could have, if based solely on the reasoning of the one, or the consultation of the other. To these considerations must be added the constitutional protection which the presence of a jury affords to the free citizen—a matter too well known to need much explanation. Suffice it to say that it rests on the principle—a principle by no means peculiar to us (*f*)—of leaving a portion of the judicial authority in the hands of the people, instead of vesting the whole in some exclusive or professional body. Now it is one of the popular fallacies of the day—one which is frequently put forward, and still more frequently insinuated by the enemies of the jury system, and too often incautiously admitted by its friends—that that constitutional protection is the sole advantage of this mode of trial, and that that protection is required in criminal cases only. The law of England, however, as we trust will appear from what has been already said, has established the trial by judge and jury, in the conviction that it is the mode best calculated to ascertain the truth, and do the greatest amount of justice, in every sense of that word, in the great majority of cases; the constitutional protection afforded by it being only a collateral, although most important, consequence of the general arrangement. So obvious is this, that some of those who have attacked the jury system in the main, concede that it ought to be retained in cases where the liberty of the subject may come in question. (*g*) But who could define beforehand what those cases are? The most ordinary case, criminal or civil, may disclose

(*f*) See *supra*, § 83, note (2).

(*g*) Bentham's *Principles of Judicial Procedure*, ch. 23, § \*



in its progress a most important constitutional question, wholly imperceptible at its outset; and we may add, by way of illustration, that two of the most important constitutional questions that ever presented themselves to a tribunal were raised, one in a special action on the case, (*h*) the other in an action for libel. (*i*) "The distinction," says an eminent jurist of the last century, "between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two, long continue to flourish, unspoiled either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries." (*h*)

86. 3. We come to the third great feature of the common-law mode of proof—the general principles by which the admissibility of evidence is governed. And here it is to be observed that the rules of evidence are of three kinds—1st. Those which relate to evidence in *causa*, i. e. evidence adduced to prove the questions in dispute. 2d. Those affecting evidence *extrà causam*, or that which is used only to test the accuracy of media of proof. 3d. Rules of forensic practice respecting evidence. Now it is to the first of these that the term "rules of evidence" most properly applies—much evidence which would be rejected if tendered in *causa*, being perfectly receivable as evidence *extrà causam*; and there are few trials in which this sort of evidence does not play an important part. Again, the judge has a certain latitude allowed him with respect to the rules of forensic proof. He may ask any questions in any form, and at any stage of the cause, and to a certain extent even allow parties or

(*h*) *Ashby v. White*, *Ld. Raym.* 938.      (*h*) *Hargrave's Co. Litt.* 155 *h*.

(*i*) *Stockdale v. Hansard*, 9 *A. &* note 5.

their advocates to do so. This, however, does not mean that he can receive illegal evidence at pleasure; for if such be left to the jury, a new trial may be granted, even though the evidence were extracted by questions put from the bench. But it is a power necessary to prevent justice being defeated by technicality, to secure indicative evidence, (*l*) and in criminal cases to assist in fixing the amount of punishment. And it should be exercised with due discretion. “Discretio est discernere per legem, quod sit justum”: (*m*) “In maxima potentia minima licentia”: (*n*) “Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colorable glosses and pretenses, and not to do according to their wills and private affections.” (*o*)

87. Confining our attention therefore to evidence in causa—it was said by a most eminent judge in a most important case, that “The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit.” (*p*) And Lord Chief Baron Gilbert, to whom principally we are indebted for reducing our law of evidence into a system, says, “The first and most signal rule, in relation to evidence, is this, that a man must have the utmost evidence the nature of the fact is capable of;” (*q*) “the true meaning of the rule of law, that requires the greatest evidence that the nature of the thing is capable of, is this: That no such evidence shall be brought, which ex natura rei sup-

(*l*) For “indicative” evidence, see *infra*.

(*m*) Co. Litt. 227 b; 2 Inst. 56; 4 Id. 41; 6 Q. B. 700.

(*n*) Hob. 159.

(*o*) 5 Co. 100 a. See also 7 Co.,

Calvin’s Case, 27 a, and 10 Co. 146 a 19 How. St. Tr 1089; 4 Burr. 2539.

(*p*) Lord Hardwicke, Ch., in *Omychund v. Barker*, 1 Atk. 21, 49.

(*q*) Gilb. Ev. 4, 4th ed.

poses still a greater evidence behind, in the party's own possession and power." (r) And in another old work of authority: (s) "It seems in regard to evidence to be an uncontestable rule, that the party, who is to prove any fact, must do it by the highest evidence of which the nature of the thing is capable." Similar language is to be found in most of our modern books. (t)

The important rule in question has, however, been very often misunderstood; partly from the ambiguous nature of the language in which it is enunciated, and partly from its being commonly accompanied by an illustration which has been confounded with the rule itself. "If," says Lord Chief Baron Gilbert, (u) "a man offers a copy of a deed or will, where he ought to produce the original, this carries a presumption with it, that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore the proof of a copy in this case is not evidence." This is undoubtedly true, but it is a great mistake to suppose it to be the full extent of the rule—"Exempla illustrant, non restringunt legem." (x) Sometimes, again, it has been misunderstood, as implying that the law requires in every case the most convincing or creditable evidence which could be produced under the circumstances. But all the authorities agree that this is not its meaning; (y) as further appears from the maxims, that "there are no degrees of parol evidence," and "no degrees of secondary evidence." Suppose an indictment for an assault: or, to make the case stronger,

(r) Gilb. Ev. 16, 4th ed.

(s) Bac. Abr. Evid. I. Ed. 1736.

(t) 3 Blackst. Comm. 368; B. N. P. 293; Peake's Ev. 8; 2 Evans' Poth.

147, 148; 1 Greenl. Ev. § 82 7th ed., &c.

(u) Gilb. Ev. 16, 4th ed.

(x) Co. Litt. 24 a.

(y) See the authorities in note (t).

for wounding with intent to murder (an offense capital until the 24 & 25 Vict. c. 100, and still punishable with penal servitude for life): the injured party, though present in court, is not called as a witness, and it is proposed to prove the charge by the evidence of a person who witnessed the transaction at the distance of a mile, or even through a telescope; this evidence would be admissible, because it is connected with the act—the senses of the witness having been brought to bear upon it;—and the not producing what would probably be more satisfactory, the evidence of the party injured, is mere matter of observation to be addressed to the jury. Again, by “secondary evidence” is meant derivative evidence of the contents of a written document; and it is a principle that such is not receivable unless the absence of the “primary evidence,” the document itself, is satisfactorily accounted for. (z) But when this has been done, any form of secondary evidence is receivable. (a) Thus, the parol evidence of a witness is admissible though there is a copy of the document, and the probability that it would be more trustworthy than his memory is only matter of observation. (b)

88. The true meaning of this fundamental principle will be best understood by considering the three chief applications of it. Evidence, in order to be receivable, should come through proper instruments, and be in general original, and proximate. With respect to the first of these: with the exception of a few matters which either the law notices judicially, or which are deemed too notorious to require proof, the judge and jury must not decide facts on their per-

(z) *Infra*, bk. 3, pt. 2, ch. 3.

(b) *Doe d. Gilbert v. Ross*, 7 M. &

(a) *Doe d. Gilbert v. Ross*, 7 M. & W. 106, 107.  
W. 102.

sonal knowledge; and they should be in a state of legal ignorance of everything relating to the questions in dispute before them, until established by legal evidence, or legitimate interference from it. (*c*) “Non refert quid notum sit judici, si notum non sit in formâ judicii.” (*d*) It is obvious that if they were allowed to decide on impressions, or on information acquired elsewhere, not only would it be impossible for a superior tribunal, the parties, or the public, to know on what grounds the decision proceeded, but it might be founded on common rumor, or other forms of evidence, the very worst instead of the best.

89. The next branch of this rule is that which exacts original and rejects derivative evidence—that no evidence shall be received which shows, on its face, that it only derives its force from some other which is withheld. (*e*) “Melius (or ‘satiùs’) est petere fontes quàm sectari rivulos.” (*f*) The terms “primary” and “secondary” evidence are used by our law, in the limited sense of the original and derivative evidence of written documents; the latter of which is receivable when, by credible testimony, the existence of the primary source has been established and its absence explained. But derivative evidence of other forms of original evidence is in general rejected absolutely; as where supposed oral evidence is delivered through oral, and the various other sorts of evidence comprised in practice under the very inadequate phrase “hearsay evidence.” (*g*)

(*c*) *Infra*, bk. 3, pt. 1, ch. 1; *Introd.* § 38.

(*d*) 3 Bulst. 115.

(*e*) Per Parke, B., in delivering the judgment of the court of exchequer in *Doe d. Welsh v. Langfield*, MS. Hil. Vac. 1847, reported 16 M. & W.

497; *Doe d. Gilbert v. Ross*, 7 Id. 102, 106, per Parke, B.; *Macdonnell v. Evans*, 11 C. B. 930, 942, per Maule, J.

(*f*) Co. Litt. 305 b; 8 Co. 116 b; 10 Co. 41 a.

(*g*) *Infra*, bk. 3, pt. 2, ch. 4.

90. The remaining application of this great principle which we propose to notice at present, seems based on the maxim, "In jure non remota causa, sed proxima spectatur." (*h*) It may be stated thus, that, as a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires an open and visible connection between the principal and evidentiary facts, whether they be ultimate or sub-alternate. This does not mean a necessary connection—that would exclude all presumptive evidence—but such as is reasonable, and not latent or conjectural. In this our judicial evidence partakes of the very essence of all sound municipal law, and preserves the lives, liberties, and properties of men, by placing an effectual rein on the imagination of those entrusted with the administration of justice, and preventing decision on remote inferences and fancied analogies. (*i*)

91. The true character and value of the important principle now under consideration, is, however, more easily conceived than described. In dealing with natural evidence, the connection between the principal and evidentiary facts must be left to instinct; (*k*) in legal evidence this is replaced by a sort of legal instinct, or legal sense, acquired by practice; and the old observation, "*Multa multo exercitamentis facilius quam regulis percipies*" (*l*) becomes perfectly applicable. A few instances, however, may serve to illustrate. On a criminal trial, the confession of a third party not produced as a witness, that he was the real criminal, and that the accused is innocent, although certainly not destitute of natural weight, would be

(*h*) Bac. Max. of the Law Reg. 1;

(*i*) Introd. § 38.

12 East, 652; 14 M. & W. 483; 6 B.

(*k*) 1 Benth. Jud. Ev. 44.

& S. 881; 11. & R. 61; 18 C. B. 379;

(*l*) 4 Inst. 50.

18 Jur. 962.

rejected, from its remoteness and want of connection with the accused, and the manifest danger of collusion and fabrication. So, if a man writes in his pocket-book that he owes me £5, it is reasonable evidence against him that he owes me that sum, although it is quite possible he may be mistaken. But suppose he were to write in it that I owe him £5, that statement though possibly quite true, is no evidence against me for the want of connection is obvious. Again, the bad character or reputation of an accused person, although strong moral is not legal evidence against him, unless he sets up his character as a defense to the charge. (*m*) The sound policy which requires that even the worst criminals shall receive a fair and unprejudiced trial, renders this rule indispensable. So, a man's appearance and physiognomy are not unfrequently excellent guides to his character and disposition; but they ought not to be, and they are not receivable as legal evidence against him. (*n*)

92. But whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial, or rejected as conjectural evidence, is often a question of extreme difficulty. One test, perhaps, is to consider whether any imaginable number of pieces of evidence, such as that tendered, could be made the ground of decision; for it is the property of a chain of genuine circumstantial evidence, that, however inconclusive each link is in itself, the concurrence of all the links may amount to proof, often of the most convincing kind. Suppose, in a case of

(*m*) See this subject very fully considered in *Reg. v. Rowton*, 34 L. J., M. C. 57.

(*n*) Some of the French lawyers thought they ought. "On allait jusqu'à mettre au nombre de ces indices"

(*i. e.*, indices éloignés) "la mauvaise physiognomie de l'accusé, ou le vilain nom qu'il portait. Mais c'étaient là, il faut en convenir, des indices très-éloignés." Bonnier, *Traité des Preuves*, § 652.

murder by a cutting instrument, no eye-witness being forthcoming, the criminative facts against the accused (*o*) were: 1. He had had a quarrel with the deceased for a short time previous. 2. He had been heard to declare that he would be revenged on the deceased. 3. A few days before the murder, the accused bought a sword or large knife, which was found near the corpse. 4. Shortly after the murder he was seen at a short distance from the spot and coming away from it. 5. Marks corresponding with the impressions made by his shoes were traceable near the body. 6. Blood was found on his person soon after the murder. 7. He absented himself from his home immediately after it. 8. He gave inconsistent accounts of where he was on the day it took place. The weakness of any one of these elements, taken singly, is obvious, but collectively they form a very strong case against the accused. Now suppose, instead of the above chain of facts, the following evidence was offered. 1. The accused was a man of bad character. 2. He belonged to a people notoriously reckless of human life, and addicted to assassination. 3. On a former occasion he narrowly escaped being convicted for the murder of another person. 4. Much jealousy and ill-feeling existed between his nation and that to which the deceased belonged. 5. On the same spot, a year before, one of the latter was murdered by one of the former in exactly the same way. 6. The murderer had also robbed the deceased, and the accused was well known to be avaricious. 7. He had been overheard, in his sleep, to use language implying that he was the murderer. (*p*) 8. All his

(*o*) This expression is used in 11 & 12 Vict. c. 46, § 1; 30 & 31 Vict. c. 35, §. 6.

(*p*) *Infra*, bk. 3, pt. 2, ch. 7.



neighbors believed him guilty ; or, supposing the case one of public interest, both houses of parliament had voted addresses to the crown in which he was assumed to be the guilty party. These and similar matters, however multiplied, could never generate that rational conviction on which alone it is safe to act ; and accordingly not one of them would be received as legal evidence.

93. It may be objected, and, indeed, Bentham's Treatise on Judicial Evidence is founded on the notion, that by exclusionary rules like the above, much valuable evidence is wholly sacrificed. (*q*) Were such even the fact, the evil would be far outweighed, by the reasons already assigned for imposing a limit to the discretion of tribunals, in declaring matters proved or disproved. (*r*) But when the matter comes to be carefully examined, it will be found that the evidence in question need seldom be lost to justice ; for, however dangerous and unsatisfactory it would be as the basis of final adjudication, it is often highly valuable as "indicative evidence," *i. e.* evidence not in itself receivable, but which is "indicative" of better. (*s*) Take the case of derivative evidence—a witness offers to relate something told him by A. ; this would be stopped by the court ; but he has indicated a genuine source of testimony, A., who may be called, or sent for. So, a confession of guilt which has been made under promise of favor or threat of punishment, is inadmissible by law ; yet any facts discovered in consequence of that confession, such, for instance, as the finding of stolen property, are good

(*q*) See that work, *passim*.

(*r*) *Supra*, § 90, and Introd. § 3<sup>d</sup>.

(*s*) The phrase "indicative evidence" is used in this sense by Bentham, 1 Jud. Ev. 37, and bk. 6, ch. 11, sect. 4,

as well as in his "Principles of Judicial Procedure, &c." ch. 11, sects. 1 and 3. In one place he calls it "Evidence of Evidence." 3 Jud. Ev. 554.

legal evidence. (*t*) Again, no one would think of treating an anonymous letter as legal evidence against a party not suspected of being its author, yet the suggestions contained in such letters have occasionally led to disclosures of importance. In tracing the perpetrators of crimes, also, conjectural evidence is often of the utmost importance, and leads to proofs of the most satisfactory kind, sometimes even amounting to demonstration. It is chiefly, however, on inquisitorial proceedings—such as coroners' inquests, inquiries by justices of the peace before whom persons are charged with offenses, and the like—that the use of "indicative evidence" is most apparent: though even these tribunals cannot act on it.

94. The rules of evidence are in general the same in civil and criminal proceedings; (*u*) and bind alike crown and subject, prosecutor and accused, plaintiff and defendant, counsel and client. There are, however, some exceptions. Thus the doctrine of estoppel has a much larger operation in civil proceedings. (*x*) So an accused person may, at least if undefended by counsel, rest his defense on his own unsupported statement of facts, and the jury may weigh the credit due to that statement; (*y*) whereas in civil cases, nothing must be opened to the jury which it is not intended to substantiate by proof. (*z*) Again, confessions or other self-disserving statements of prisoners, will be rejected if made under the influence of undue

(*t*) *R. v. Lockhart*, 2 East, P. C. 658; *R. v. Warickshall*, 1 Leach, C. L. 263; *R. v. Gould*, 9 C. & P. 364; *R. v. Griffin*, R. & R. C. C. 151.

(*u*) *R. v. Burdett*, 4 B. & A. 95, 122, per Best, J.; Attorney-General *v. Le Merchant*, 2 F. R. 201, n.; *R. v. Murphy*, 8 C. & P. 297, 306; Leach *v.*

Simpson, 5 M. & W. 309, 312, per Parke, B.; 25 How. St. Tr. 1314; 29 Id. 764.

(*x*) *Infra*, bk. 3, pt. 2, ch. 7.

(*y*) *Infra*, bk. 4, pt. 1.

(*z*) *Stevens v. Webb*, 7 C. & P. 60, 61; *Duncombe v. Daniell*, 8 Id. 222, 227.

promises of favor, or threats of punishment; (*a*) but there is no such rule respecting similar statements in civil cases. So, although both these branches of the law have each their peculiar presumptions, still the technical rules regulating the burden of proof, cannot be followed out in all their niceties when they press against accused persons. (*b*)

95. But there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; (*c*) but in the latter, especially when the offense charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; (*d*) or, as an eminent judge expressed it, "Such a moral certainty as convinces the minds of the tribunal as reasonable men, beyond all reasonable doubt." (*e*) The expression "moral certainty" is here used in contradistinction to physical

(*a*) *Infra*, bk. 3, pt. 2, ch. 7.

(*b*) Huberus, *Præl. Jur. Civ. lib. 22*; tit. 3, n. 16. See per Lord Kenyon, C. J., in *R. v. Hadfield*, 27 How. St. Tr. 1353.

(*c*) Plowd. 412; 1 Greenl. Ev. 13 a, 7th ed.; MacNally's Ev. 578; Cooper v. Slade, 6 Ho. Lo. Cas. 762, per Willes, J.

(*d*) See *Introd.* § 49. The juror's oath seems framed with a view to the

above distinction. In civil cases he is sworn "well and truly to try the issue joined between the parties, &c.," whilst in treason or felony his oath is that he "shall well and truly try, and true deliverance make, between our sovereign lady the queen and the prisoner at the bar, &c."

(*e*) Parke, B., in *R. v. Sterne*, Surrey Sum. Ass. 1843, MS.

certainty, or certainty so called ; (*f*) for the physical possibility of the innocence of an accused person can never be excluded. Take the strongest case,—a number of witnesses of character and reputation, and whose evidence is in all respects consistent, depose to having seen the accused do the act with which he is charged ; still the jury only believe his guilt on two presumptions, either or both of which may be fallacious, viz., that the witnesses are neither deceived themselves, nor deceiving them ; (*g*) and the freest and fullest confessions of guilt have occasionally turned out untrue. (*h*) Even if the jury were themselves the witnesses, there would still remain the question of the identity of the person whom they saw do the deed, with the person brought before them accused of it ; (*i*) the identity of the person is a subject on which many mistakes have been made. (*k*) The wise and humane maxims of law, that it is safer to err in acquitting than condemning, (*l*) and that it is better that many guilty persons should escape than one innocent person suffer, (*m*) are, however, often perverted to justify the acquittal of persons of whose guilt no reasonable doubt could exist ; and there are other maxims which should not be forgotten, “Interest reipublicæ ne maleficia remaneant impunita, (*n*) “Minatur innocentes, qui parcit nocentibus.” (*o*)

96. Again, the psychological question of the intent with which acts are done, plays a much greater

(*f*) Introd. § 6.

(*l*) 2 Hale, P. C. 290.

(*g*) Domat, Lois Civ. pt. 1, liv. 3, tit. 6, Préamb. ; 2 Ev. Poth. 332 ; Rosc. Civ. Ev. 25, 9th ed.

(*m*) 2 Hale, P. C. 289 ; 4 Blackst. Comm. 358.

(*h*) *Infra*, bk. 3, pt. 2, ch. 7.

(*n*) Jenk. Cent. 1, Cas. 59. See also 4 Co. 45 a.

(*i*) See M. 49 Hen. VI. 19 B. pl. 26.

(*o*) 4 Co. 45 a. See also Jenk. Cent. 3, Cas. 54.

(*k*) *Infra*, bk. 3, pt. 2, ch. 6.

part in criminal than in civil proceedings.<sup>1</sup> The maxim "Actus non facit reum, nisi mens sit rea," (*p*) runs through the criminal law, although in some instances a criminal intention is conclusively presumed from certain acts; (*q*) while in civil actions, to recover damages for misconduct or neglect, it is in general no answer that the defendant did not intend mischief (*r*)—"Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus." (*s*)<sup>2</sup> There are, however, exceptions to this; and, whether an act was done knowingly, often becomes an important consideration in civil suits. (*t*) It may be laid down as a general principle, that, provided a man has a right by law to do an act, the intention with which he does it is immaterial. (*u*) "Nullus videtur dolo facere, qui suo jure utitur." (*x*)<sup>3</sup> All contracts, likewise, are

(*p*) Co. Litt. 247 b; 3 Inst. 107; Q. B. 101; Jackson v. Smithson, 15 4 How. St. Tr. 1403; T. Raym. 423; M. & W. 563; Card v. Case, 5 C. B. 7 T. R. 514; 2 East, 104; 1 Den. C. 622; Hudson v. Roberts, 6 Exch. C. 389; 5 Jur. N. S. 649. 697; Worsh v. Gilling, L. R., 2 C. P. 1.

(*q*) *Infra*, bk. 3, pt. 1, ch. 2.

(*r*) M. 6 Edw. IV. 7 B. pl. 18; Hob. 134; T. Raym. 422; Willes, 581; 2 East, 104; 16 M. & W. 442.

(*s*) Bacon, Max. Reg. 7.

(*t*) 4 Co. 18 b; May v. Burdett, 9

(*u*) Oakes v. Wood, 2 M. & W. 791; Simmons v. Lillystone, 8 Exch. 431; Ridgway v. The Hungerford Market Company, 3 A. & E. 171.

(*x*) Dig. lib. 50, t. 17, l. 55.

<sup>1</sup> The act itself does not make a man guilty, unless his intentions were so. Broom, Leg. Max. 275.

<sup>2</sup> This is one of the Baconian maxims. In capital cases the law will excuse or extenuate much that it would severely visit in civil cases. In capital cases the law will not punish in so high a degree, except the malice of the will and intention appear, but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged than the malice of him that was the wrong-doer. Bac. Max. Reg. 7; Broom, Leg. Max. 291.

<sup>3</sup> He is not to be esteemed a wrong-doer who merely avails himself of his legal rights. Dig. 17, 50, 55; Broom, Leg. Max. 124.

founded on an intention of the parties, either expressed by themselves or implied by law from circumstances.

97. And here a question presents itself, whether and how far the rules of evidence may be relaxed by consent? In criminal cases, at least in treason and felony, it is the duty of the judge to see that the accused is condemned according to law; and, the rules of evidence forming part of that law, no admissions from him or his counsel will be received. On the other hand, however, much latitude in putting questions and making statements is given, *de facto* if not *de jure*, to prisoners who are undefended by counsel. So, no consent could procure the admission of evidence which public policy requires to be excluded; such as secrets of state and the like. Moreover, no admission at a trial will dispense with proof of the execution of certain attested instruments, though the instrument itself may be admitted before the trial, with the view to save the trouble and expense of proving it. (y) Subject, however, to these and some other exceptions, the general principles, "*Quilibet potest renunciare juri pro se introducto*" (z)—"*Omnis consensus tollit errorem*" (a)—seem to apply to evidence in civil cases; and much inadmissible evidence is constantly received in practice, because the opposing counsel either deems it not worth while to object or thinks its reception will be beneficial to his client. It has, however, been held, that where a valid objection is taken to the admissibility of evidence, it is discretionary with the judge whether he will allow the objection to be withdrawn. (b)

98. Whether the rules respecting the incompe

(y) *Infra*, bk. 3, p. 2, ch. 7.

(a) Co. Litt. 126 a.

(z) Co. Litt. 92 a, 166 a, 223 b; 10 Co. 101 a; 2 Inst. 183; 4 Bl. Com. 316.

(b) *Barbat v. Allen*, 7 Exch. 609.

tency of witnesses could be dispensed with by consent, seems never to have been settled. In *Pedley v. Wellesly*, (*c*) Best, C. J., said that Lord Mansfield once permitted a plaintiff to be examined with his own consent; (*d*) and although some of the judges doubted the propriety of that permission, he (the chief justice) thought it was right. In *Dewdney v. Palmer*, (*e*) where, after a witness had been sworn on behalf of the plaintiff, it was proposed to show by evidence that he was the real plaintiff, the judge refused to allow this course; and his ruling was affirmed by the court of exchequer, on the ground that the objection ought to have been taken on the *voir dire*. But in a subsequent case of *Jacobs v. Layborn*, (*f*) the same court, consisting of Lord Abinger, C. B., and Rolfe, B., overruled this, and held that objections to competency might be made at any stage of the trial. (*g*) So, arbitrators are bound by the legal rules of evidence; (*h*) yet on submissions to arbitration previous to the 14 & 15 Vict. c. 99, it was generally made part of the rule of court that the parties might be examined as witnesses. In the case already cited of *Pedley v. Wellesley*, (*i*) a female was called as witness for the plaintiff, and it appeared that after being served with the subpoena she had married the defendant. On her evidence being objected to, it was replied that a party to a suit cannot by any act, laudable or otherwise, deprive his adversary of the testimony of his witness; but Best, C. J., said he should allow the witness to be

(*c*) 3 C. & P. 558.

(*d*) The case here referred to is thought to be *Norden v. Williamson*, 1 Taunt. 378, Lord Mansfield being put by mistake for C. J. Mansfield. See per Parkes, B., in *Barbat v. Allen*, 7 Exch. 612.

(*e*) 4 M. & W. 664.

(*f*) 11 M. & W. 685. See, however, the observations of Parke, B., in *Yardley v. Arnold*, 10 M. & W. 145.

(*g*) See *R. v. Whitehead*, 35 L. J., M. C. 186.

(*h*) *Att.-Gen. v. Davidson*, 1 McCl. & Y. 160; *Banks v. Banks*, 1 Gale, 46

(*i*) 3 Car. & P. 558.

examined, if the defendant consented, not otherwise. In a much older case, (*k*) where it was proposed by a man's consent to examine his adversary's wife as a witness, Lord Hardwicke, C. J., said, "The reason (*l*) why the law will not suffer a wife to be a witness for or against her husband, is to preserve the peace of families, and therefore I shall never encourage such a consent;" and she was not examined. Such evidence has been rejected in America, on the ground that the interest of the husband in preserving the confidence reposed in the wife is not the sole foundation of the rule; the public having also an interest in the preservation of domestic peace, which might be disturbed by her testimony notwithstanding his consent, and that there is a very great temptation to perjury in such cases. (*m*) To this latter argument it may be observed, that there is a much greater temptation to perjury, when an accomplice in a case of treason or felony is examined as a witness against his companions; or when an heir apparent comes forward as a witness for his father, the title to whose lands is in question.

99. All these cases took place before the 14 & 15 Vict. c. 99 had rendered the parties to a suit competent witnesses in general. After the passing of that statute, and previous to the 16 & 17 Vict. c. 83, (*n*) the question arose whether the wives of such parties were also rendered competent; which, after some conflict of opinion, was resolved in the negative. (*o*) In *Barbat v. Allen*, (*p*) the plaintiff's case having been

(*k*) *Barker v. Dixie*, Ca. Temp. Hardw. 264.

(*l*) See on this subject, *infra*, bk. 2, pt. 1, ch. 2.

(*m*) 1 Greenl. Ev. § 340, 7th ed.

(*n*) Which rendered husbands and wives competent witnesses for or

against each other in civil cases. See *infra*, bk. 2, pt. 1, ch. 2.

(*o*) See *Stapleton v. Crofts*, 18 Q. B. 367; *Barbat v. Allen*, 7 Exch. 609, and *McNeillie v. Acton*, 17 Jur. 661.

(*p*) 7 Exch. 609.



proved by a witness, the defendants' counsel proposed to call the wife of one of the defendants, to prove fraud, by admissions of that witness, made in her presence. The plaintiff's counsel objected, and Pollock, C. B., refused to admit her testimony. Subsequently the plaintiff's counsel offered to waive the objection; but the judge, notwithstanding, refused to receive the evidence. A verdict having been found for the plaintiff, a rule was granted to set it aside on the grounds, first, that the statute had rendered the wife a competent witness; and, secondly, that, if not, her testimony ought to have been received when the objection was waived. This rule having been argued, and several of the preceding cases, with some others, cited, the court discharged it: holding unanimously, that the statute had not rendered the wife competent; and that, even supposing the objection could be waived by consent, the allowing it to be waived was discretionary with the judge. But the members of the court were not agreed as to whether the objection could be waived. Parke and Martin, BB., said that, if it were necessary to decide that question, they would like further time for consideration. Platt, B., said he was of the same opinion as Parke, B., and for the same reasons. Pollock, C. B., however, delivered his judgment more at length, as follows:—"In my opinion, a judge is bound to administer the whole law of evidence; and although a practice has crept in of admitting inadmissible evidence by consent, still that is a matter for the discretion of the judge. The cases which have been adverted to, with reference to waiving the objection to an interested witness, scarcely apply; for, strictly speaking, all objections to the competency of a witness, on the score of interest, ought to be taken on the *voir dire*, before the witness is

sworn. Therefore, in those cases where persons have been examined by consent, although they had an avowed interest, it was only going back to the old law; and, after the witness was sworn, there was, in truth, no objection to waive. I think that it is in the discretion of the judge whether he will admit the evidence objected to; otherwise, if the parties agreed that a witness should give his evidence unsworn, or if a person openly declared himself an atheist, I do not see why those persons might not be examined. The consent of the parties will not entitle them to use an affidavit which is inadmissible. Some additional light may be thrown on the subject by this circumstance—that when parties are to be examined in a court of law, under an order of a court of equity, the order is positive that the witnesses shall be examined, which would be useless unless the court had power to reject them notwithstanding the consent of the parties. I think that the judge, in his discretion, has a right to insist on the law of England being administered; and, when any departure from it is proposed, to say to the parties, ‘You shall not make a law for yourselves.’” In a subsequent case, however, of *Hodges v. Lawrence*, (9) where an application by a defendant to remove a cause from a county court was resisted, on the ground that the plaintiff’s principal witness was his wife, and consequently he would be deprived of her testimony if the cause were brought into a superior court, the court of exchequer granted the application, on the defendant’s consenting that the wife should be examined as a witness.

100. We now come to consider the two other remarkable features of the English system of judicial evidence which were mentioned early in this

(9) 17 Jur. 421.

Part, (r) namely, the viva voce examination of witnesses, and the publicity of judicial proceedings. Our law of evidence bears a general resemblance to other systems, in its safeguards or securities for the truth of testimony—like them it has its political sanction of truth, an oath or affirmation, its legal forms of preappointed evidence, its rules as to the incompetency of witnesses, and, in a few cases, its rules requiring a plurality of witnesses. But of all checks on the mendacity and misrepresentations of witnesses, the most effective is the requiring their evidence to be given viva voce, in presence of the party against whom they are produced, who is allowed to “cross-examine” them, *i. e.*, to ask them such questions as he thinks may serve his cause. The great tests of the truth of any narrative are the consistency of its several parts, and the possibility and probability of the matters narrated. (s) Stories false in toto are comparatively rare (t)—it is by misrepresentation, suppression of some matters, and addition of others, that a false coloring is given to things; and it is only by a searching inquiry into the surrounding circumstances, that the whole truth can be brought to light. Now, although much valuable evidence is often elicited by questions put from the tribunal, and although the story told by a witness frequently discloses, of itself, some inconsistency or improbability fatal to the whole, it is chiefly from the party against whom false testimony is directed, that we can expect to obtain the most efficient materials for its detection. He, above all others, is interested in exposing it, and is the person best acquainted, often the only person acquainted with the facts as they have really occurred. Besides, as the answer to one question frequently

(r) *Supra*, § 80.(s) *Intro.* § 24.(t) *Id.* § 26.

suggests another, it is extremely difficult for a mendacious witness to come prepared with his story, ready fitted to meet any question which may be thus put to him on a sudden. (*u*) The other great check is the publicity of our judicial proceedings—our courts of justice being open to all persons; and in criminal cases, the by-standers are even invited, by proclamation, to come forward with any evidence they may possess affecting the accused. The advantages of this are immense. “In many cases,” observes an author who is amply quoted in the present work, (*x*) “say rather in most (in all except those in which a witness, bent upon mendacity, can make sure of being apprised, with perfect certainty, of every person to whom it can by any possibility have happened to be able to give contradiction to any of his proposed statements), the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. . . . Environed, as he sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from a thousand tongues; many a known face, and every unknown one, presents to him a possible source of detection, from whence the truth he is struggling to suppress, may, through some unsuspected channel, burst forth to his confusion.

The practice of the civil (*y*) and canon laws, as is

(*u*) The advantages of the common-law mode of interrogating witnesses, as compared with that made use of in the civil and canon laws, and formerly in our ecclesiastical and equity courts, &c., are ably shown by Bentham, in the 3rd book of his *Judicial Evidence*.

(*x*) 1 Benth. *Jud. Ev.* 552. See that work, bk. 2, ch. 10, sect. 2, where the advantages of the publicity of judicial proceedings are very clearly pointed out.

(*y*) By the civil law we mean that form of Roman law which, during so many centuries, prevailed on the continent of Europe. The practice of the ancient Romans in a great degree resembled our own. See Acts, xxv. 16; Dig. lib. 22, tit. 5, l. 3, §§ 3 and 4; Quintilian, *Inst. Orat.* lib. 5, c. 7, and Devotus, *Inst. Canon.* vol. 2, lib. 3, tit. ix. §§ 17 and 18, 5th ed.

well known, differs wholly from ours in these respects. Witnesses are examined in private by a judge or officer of the court, and their depositions, reduced into form, are transmitted to the tribunal by which the cause is to be tried. And, absurd as this may seem, it is not without its defenders, who condemn our common-law system altogether, and contend that secrecy and written deposition constitute the very essence of justice. All their arguments, however, when examined, come to this, that it is wise to sacrifice certain and constant good, in order to avoid occasional and exceptional evil. Where, say they, witnesses are called on to explain their answers, and one question is followed up by another, a false witness may adapt his answers to circumstances; therefore, let every witness who happens to be misunderstood—all men are not masters of language, and in the hands of the ablest of us it often fails to communicate our thoughts—be deprived of the opportunity of setting himself right with his interrogator and the tribunal. Again, an honest, but timid, or weak-minded, witness may be so affected by the novelty of his situation, or so brow-beaten by his cross-examiner, as to be unable to give evidence, or he may, perhaps, be made even to contradict himself; therefore, say the partisans of the civil and canon law practice, let the feeling of shame that so often deters men from stating in public, falsehoods which they would unblushingly state in private, be erased from the minds of all witnesses who present themselves in courts of justice; and let us shut out the incalculable light thrown on every sort of verbal testimony by the demeanor of the person who gives it. The most limited experience will testify, that what a man says is often of very small account, indeed, compared with his manner of saying it. Be-

sides, when justice is defeated by cross-examination pushed to excess, the chief fault rests with the judge, whose duty it is to re-assure and encourage the witness. And, after all, brow-beating and annoying a witness are very different from discrediting him. We should remember that the cross-examination takes place in presence of a judge and jury, who are on the watch to discover whether the confusion or vacillation of the witness is attributable to false shame, mistake, or mendacity. Most of the advantages of secret examination, without its dangers, are attainable by examining the witnesses out of the hearing of each other—a practice constantly adopted in courts of common law, when combination among them is suspected, or the testimony of one is likely to exercise a dangerous influence over others.

101. But, however valuable the principle which requires the presence of witnesses at a trial, the strict enforcement of the rule, under all circumstances, would be an impediment to justice. Either from the evils of an unbending adherence to it being less felt in early times, or from the comparatively slender attention paid to evidence in general by our ancient lawyers, certain it is that the common law made little or no provision on this subject; but large improvements have been effected by modern legislation. After the union with Scotland and the complete establishment of our Indian empire, the mischiefs arising out of the imperfections of the ancient system became too great to be overlooked; and the 13 Geo. 3, c. 63, contains several provisions directed to this object. In the first place, it enacts, (z) that “in all cases of indictments or informations, laid or exhibited in the Court of King’s Bench, for misdemeanors

(z) Sect. 40.

or offenses committed in India, it shall be lawful for his Majesty's said court, upon motion to be made on behalf of the prosecutor, or of the defendant or defendants, to award a writ of mandamus, requiring the chief justice and judges of the supreme court of judicature for the time being, or the judges of the Mayor's Court at Madras, Bombay, or Bencoolen, as the case may require, who are hereby respectively authorized and required accordingly, to hold a court with all convenient speed, for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments or informations respectively; and, in the meantime, to cause such public notice to be given of the holding of the said court, and to issue such summons or other process, as may be requisite, for the attendance of witnesses, and of the agents or counsel, of all or any of the parties respectively, and to adjourn, from time to time, as occasion may require: and such examination as aforesaid shall be then and there openly and publicly taken *vivâ voce* in the said court, upon the respective oaths of witnesses, and the oaths of skillful interpreters, administered according to the forms of their several religions; and shall, by some sworn officer of such court, be reduced into one or more writing or writings on parchment, &c., and shall be sent to his Majesty, in his Court of King's Bench, closed up, and under the seals of two or more of the judges of the said court, and one or more of the said judges shall deliver the same to the agent or agents of the party or parties requiring the same; which said agent or agents (or in case of his or their death, the person into whose hands the same shall come) shall deliver the same to one of the clerks in court of his Majesty's Court of King's Bench, in the public office

and make oath that he received the same from the hands of one or more of the judges of such court in India, &c.; and such depositions, being duly taken and returned, according to the true and intent meaning of this act, shall be allowed and read, and shall be deemed as good and competent evidence as if such witness had been present, and sworn and examined *vivâ voce* at any trial for such crimes or misdemeanors, as aforesaid, in his Majesty's said Court of King's Bench, any law or usage to the contrary notwithstanding; and all parties concerned shall be entitled to take copies of such depositions at their own costs and charges." And by a subsequent section, (a) "when any person whatsoever shall commence and prosecute any action or suit, in law or equity, for which cause hath arisen, or shall hereafter arise in India against any other person whatever, in any of his Majesty's courts at Westminster, it shall and may be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs in the nature of a mandamus or commission, as aforesaid, to the chief justice and judges of the said supreme court of judicature for the time being, or the judges of the Mayor's Court at Madras, Bombay, or Bencoolen, as the case may require, for the examination of witnesses, as aforesaid; and such examination, being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action, in the same manner, in all respects, as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated." Another section (b) contains a proviso, that "no such depositions, taken and returned as aforesaid by virtue of this act, shall be allowed or



permitted to be given in evidence in any capital cases other than such as shall be proceeded against in Parliament."

102. This statute, it is obvious, went but a short way towards remedying the evil: and several others with similiar provisions;—as, for instance, the 42 Geo. 3, c. 85, and 1 Geo. 4, c. 101—were passed from time to time, to meet the exigencies of certain classes of cases. Nothing effectual was done, however, until the 1 Wil. 4, c. 22, entitled "An act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories and otherwise." The first section enacts, that all and every the powers, authorities, provisions and matters contained in the 13 Geo. 3, c. 63, relating to the examination of witnesses in India, shall be extended to all colonies, islands, plantations and places under the dominion of his Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his Majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority thereby given, will be necessary or conducive to the due administration of justice, in the matter wherein such writ shall be applied for.

103. The 1 Will. 4, c. 22, contained, however, other provisions more important and extensive than this. It empowered (c) each of the courts at Westminster, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas

(c) Sect. 4.

of the county palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders, to give all such directions touching the time, place and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as might appear reasonable and just. (*d*) Also, (*e*) that "when any rule or order shall be made, for the examination of witnesses within the jurisdiction of the court wherein the action shall be depending, by authority of this act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or con-

(*d*) In applying this section, the court may disallow any interrogatories which, in their opinion, might deter a witness from giving evidence before the commissioners; or, after a commission has been granted, and before

its execution, they may disallow any cross-interrogatories which they may think to be improper. *Stocks v Ellis*, L. Rep., 8 Q. B. 454.

(*e*) Sect. 5.

venient so to do : and the willful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment, &c.; provided that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause." The examination is directed to be on oath, or affirmation in cases where the law allows an affirmation ; and persons giving false evidence are to be deemed guilty of perjury. (*f*) But, lest the power of examining witnesses in this way should be perverted, to the superseding of the salutary practice of the common law, it is enacted, (*g*) that "no examination or deposition, to be taken by virtue of that act, shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial."

104. Still further improvements in this respect were effected by the 6 & 7 Vict. c. 82, which provided means for compelling the attendance of persons, to be examined under commissions for the examination of witnesses, &c., which were to be executed in parts of the realm, subject to different laws from those in which the commissions were issued ; and by the 22 Vict. c. 20, which provided for taking evidence in suits and proceedings before tribunals in the Queen's dominions, in places out of the jurisdiction of those tribunals. Again, by the 22 & 23 Vict. c. 21, s. 16, the above provisions of the 13 Geo. 3, c. 63, and the 1 Will. 4, c. 22, were extended to all suits and pro-

(*f*) Sect. 7.

(*g*) Sect. 10.

ceedings on the revenue side of the Court of Exchequer.

And now, by the "supreme court of judicature act, 1873," (*h*) "At the trial of any cause, or at any assessment of damages," "the court or a judge may, at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable: or that any witness, whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise, before a commissioner or examiner; provided, that when it appears to the court or judge, that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made, authorizing the evidence of such witness to be given by affidavit."

**105.** The old statutes 1 & 2 P. & M. c. 13, s. 4, and 2 & 3 P. & M. c. 10, s. 2, enacted, that justices of the peace, before whom persons were brought charged with felony, should, before committing to prison or admitting to bail, take the examination of the prisoner, and information of those that brought him, of the fact and circumstances thereof; and the same, or so much thereof as should be material to prove the felony, should put in writing, &c. These statutes were repealed, re-enacted, and their provisions extended to cases of misdemeanor, by 7 Geo. 4, c. 64, ss. 2, 3. And this latter enactment was in its turn repealed and amended by 11 & 12 Vict. c. 42; which enacts, (*i*) that where witnesses are examined on oath or affirmation, against a person charged

(*h*) 36 & 37 Vict. c. 66, Sched. Rule 36.

(*i*) Sect. 17.

before a justice of the peace with any indictable offense, and their evidence has been put into writing, and their depositions read over to, and signed respectively by them and the justice taking the same, "If upon the trial of the person so accused it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been so taken as aforesaid is dead, or so ill as not to be able to travel, (*k*) and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." The 1 & 2 P. & M. c. 13, s. 5, and 7 Geo. 4, c. 64, s. 4, give somewhat similar directions to coroners holding inquisitions of murder or manslaughter; and the merchant shipping act, 17 & 18 Vict. c. 104, s. 270, has some provisions of a like nature for offenses under that act.

**106.** Nor is it exclusively on witnesses that this institution of publicity exercises a salutary control. Its effect on the judge is no less conspicuous. "Upon his moral faculties," observes Bentham, (*l*) "it acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual faculties it acts as a spur, urging him to that habit of unre-

(*k*) A suggestion that, owing to the old age and nervousness of the witness, his being examined in court might be attended with danger, is not

sufficient a ground within this section for allowing his deposition to be read. Reg. 7. Farrell, 43 L. J., M. C. 94.

(*l*) 1 Jud. Ev. 523-5.

mitting exertion, without which his attention can never be kept up to the pitch of his duty. Without any addition to the mass of delay, vexation, and expense, it keeps the judge himself, while trying, under trial. Under the auspices of publicity, the original cause in the court of law, and the appeal to the court of public opinion, are going on at the same time. So many by-standers as an unrighteous judge (or rather a judge who would otherwise have been unrighteous) beholds attending in his court, so many witnesses he sees of his unrighteousness; so many ready executioners, so many industrious proclaimers, of his sentence. On the other hand, suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. . . . Publicity is further useful, as a security for the reputation of the judge (if blameless) against the imputation of having misconceived, or, as if on pretense of misconception, falsified the evidence. Withhold this safeguard, the reputation of the judge remains a perpetual prey to calumny, without the possibility of defense. . . . Another advantage (collateral indeed to the present object, yet too extensively important to be passed over without notice) is, that, by publicity, the temple of justice adds to its other functions that of a school: a school of the highest order, where the most important branches of morality are enforced by the most impressive means; a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it

and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice."

107. There are few things, however excellent in themselves, the value of which may not be overrated; and certainly the publicity of legal proceedings is not one of them. Not only are there certain cases for which privacy either total or partial is advisable, but Bentham overrates the principle of publicity when he proposes to entrust the decision of all questions, both of law and fact, to a judge; relying on the publicity of the proceedings, accompanied by ample recordation or notation of the evidence, and appeal to a superior tribunal, as sufficient checks upon his conduct. Following up this view he condemns juries in his treatise on judicial evidence; (*m*) though in other parts of the same work he bears unconscious testimony to their value; (*n*) and in his principles of judicial procedure (*o*) he admits that they ought not to be abolished in cases where the liberty of the subject is involved. There is not the slightest pretense for saying that any one of these three checks would, standing by itself, attain the desired object. First, with respect to recordation or notation of the evidence, in other words, the security afforded by writing. If the evidence is to be taken down verbatim it would add enormously to the expense of trials; if only minutes of it are to be made, the whole case does not come before the appellate tribunal; and in either case the sources of mischief which are to be found in the ignorance, the laziness, the complaisance, and even the corruption of the notary, scribe, greffier, or whatever else he may be called, are not to

(*m*) 2 Jud. Ev. 285, 286; 4 11.  
11, 333, 334; 5 Id. 531.

(*n*) See 1 Id. 351; 4 Id. 58.  
(*o*) Chap. 23, § 1.

be overlooked. Secondly, as to appeal,—appeal to a superior tribunal on mere facts, or combinations of law and fact, is, when considered in se, of all checks on misdecision the most illusory, and of all encouragements to vexatious litigation the greatest. Through the mass of allegation, argument and evidence it is sometimes almost impossible to ascertain on what ground the decision of the court below proceeded—a disbelief of the witnesses, a misunderstanding of their testimony, or an erroneous view of the law:—and the judge, whose decision is appealed from, may fairly ask that the superior tribunal shall have before it all the materials on which his decision was founded. But this is from the nature of things impossible: who is to report the demeanor of the witnesses when giving their testimony? and the evidence itself may be so voluminous, as in the case of a poor litigant, to amount to a prohibition of appeal. (*p*) Moreover, when the decision of the superior tribunal reversing that of the inferior is obtained, it carries little or no moral weight with it; for it is only the opinion of Judge A. against that of Judge B., on some question of law, or the credit due to witnesses, or the inferences to be drawn from certain facts; in which, after all, Judge B., whose decision is reversed, may be right. Of this even Bentham himself was so conscious, that

(*p*) We find the following stated as the practice of our own ecclesiastical courts, at least as they existed until recently, in which, by the way, all Bentham's three checks were united. "The party appealing is called upon to print the allegations and answers on both sides, the expense of which, including the evidence and exhibits, he must sustain in the first instance. And the opponent proctor has the

right to call on the appellant to print the whole, or so much or such parts of the evidence and exhibits in the case as he thinks fit. This may, in many instances, amount to a denial of appeal. In one particular case the party did intend to appeal, but finding that the printing alone would cost very nearly £1,000, he abandoned the idea of appealing." 3 Jur. 140.



he admits that recordation, appeal, and all other institutions in the character of checks, without publicity, would be found rather to operate as cloaks. (*q*) But publicity, standing by itself, would be equally inefficient. The trials of Naboth, Socrates, Milo, Throckmorton, Sydney, Baxter, &c., were as public as could be; *i.e.*, so far as publicity consists in the doors of the court being open to all persons who please to go into them; and as the number of persons that do this must necessarily be very limited, the publicity here spoken of by Bentham, probably means publicity through the agency of the press. The liberty of the press would not, however, last long if the power of determining both the law and the facts in all causes, both civil and criminal—of passing sentence in case of conviction in the former, and assessing the damages for the successful plaintiff in the latter—were vested in judges who are the nominees of the executive, and liable as men, to prejudices of class and station, political and personal. Let it also be remembered, that the liberty of the press in this country dates only from the latter end of the seventeenth century; that trial by judge and jury protected the other liberties of the country, long before liberty of the press had any existence, and since that period has protected both it and them; and that we find Bentham's three checks combined, in the practice of the civil tribunals of modern France, the superiority of which over all others has not, at least as yet, been demonstrated.

We trust we have shown that without the assistance of a casual tribunal, through which alone the cleansing tide of fresh thought is poured into judicial proceedings, they never could be kept pure and

healthy; and that no effectual checks ever have been, or ever can be devised, against the obvious and great dangers of entrusting the decision of facts to a fixed tribunal, however elaborately constituted. Among many other testimonies to the wisdom of our ancestors, in the constitution of their ordinary judicial tribunal, are to be found the recent introduction of the practice of taking evidence *vivà voce*, into the court of chancery, (*r*) the court of admiralty, (*s*) and the ecclesiastical courts, (*t*) and on the hearing of motions and summonses in the courts of common law; (*u*) the establishment of trial by jury in the two former courts, (*x*) and in the new court to which the principal part of the business of the ecclesiastical courts has now been transferred; (*y*) and that, on the continent of Europe, where the practice of the civil and canon laws has prevailed for centuries, we everywhere find the inhabitants loudly demanding, as reforms essential to a sound administration of justice, "The trial by jury," and "Publicity of judicial proceedings."

(*r*) 15 & 16 Vict. c. 86, ss. 28 et seq.

(*s*) 3 & 4 Vict. c. 65, ss. 7 et seq.

(*t*) 17 & 18 Vict. c. 47; 20 & 21 Vict. cc. 77 and 85.

(*u*) 17 & 18 Vict. c. 125, ss. 46 et seq.

(*x*) 21 & 22 Vict. c. 27, s. 3; 3 & 4 Vict. c. 65, s. 11.

(*y*) 20 & 21 Vict. cc. 77 and 85.

## PART II.

HISTORY OF THE RISE AND PROGRESS OF THE  
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108. It is proposed in the present part, to trace the rise and progress of the law of evidence in this

country; concluding with some observations on its actual state and prospects.<sup>1</sup>

109. On the first of these subjects little is to be found in our modern works, beyond a few dicta, not very consistent with each other. In the case of *R. v. The Inhabitants of Eriswell*, (*a*) decided in Trinity Term, 1790, Lord Kenyon, C. J., is reported to have said, "The rules of evidence have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded." And in *Bauerman v. Radenius*, (*b*) about eight years later, he informs us that at the beginning of the eighteenth century, Lord Macclesfield said that the most effectual way of removing landmarks would be by innovating on the rules of evidence; and so he said himself. This, however, is not the general opinion of the present day, in which our system of judicial evidence is commonly spoken of as something altogether modern: and in the case of *Lowe v. Jolliffe*, (*c*) decided not quite thirty years previous to that first quoted, Lord Mansfield, C. J., is reported to have declared on a trial at bar, that the court "did not then sit there to take its rules of evidence from Siderfin and Keble;" whose reports begin about a century before the time when he was speaking. In the proceedings against Queen Caroline, in the year 1820, (*d*)

(*a*) 3 T. R. 707. 721.

(*b*) 7 T. R. 663, 667.

(*c*) 1 W. Blackst. 366.

(*d*) 2 B. & B. 289; see *infra*, bk. 3, pt. 2, ch. 3.

<sup>1</sup> For a history of evidence in other countries, the student is referred to the valuable and instructive researches of Le Gontil (*Essai Historique sur les Preuves, sous les Legislations, Juive, Egyptienne, Indienne, Grecques, et Romaine, &c., &c.* Paris: Durand, 1863), a work none the less admirable for its explorations into the origin of the law of evidence than absorbingly interesting to the curious and casual reader.

Abbot, C. J., in delivering the answer of the judges to a question put by the House of Lords, said, in their judgment it is a rule of evidence as old as any part of the common law of England, that the contents of a written instrument, if it be in existence, are to be proved by the instrument itself, and not by parol evidence."<sup>1</sup> On the other hand, in the work on evidence by Messrs. Phillipps and Amos, (*e*) published in 1838, it is said that the law of evidence, according to which the determinations of the courts are at present governed, has been almost entirely created since the time of the reporters Lord Raymond, Salkeld, and Strange; *i. e.*, since a period beginning shortly after the revolution of 1688, and ending at a tolerably advanced point in the reign of Geo. II. Also, in the 10th ed. of Phillips on Evidence, published in 1852, (*f*) it is stated that the important rule, rejecting heresay or second-hand evidence, is not of great antiquity; and that one of the earliest cases in which it was acted upon is *Samson v. Yardly*, P. 19 Car. II., 2 Keb. 223.

**110.** The truth seems to be, that while "The Law of Evidence" is the creation of comparatively modern times, most of the leading principles on which it is founded have been known and admitted from the earliest; and in order to show the nature of the

(*e*) Page 335.

(*f*) Vol. I, p. 165.

<sup>1</sup> See *Causes Celebres*, Trial of Queen Caroline. New York: James Cockcroft & Co., 1874, vol. i. p. 471; *Huse v. McQuade*, 25 Mo. 388; *Clark v. N. Y. Life Ins. Co.*, 7 Lans. 323; *Weaver v. Fletcher*, 27 Ark. 510; *Basshor v. Forbes*, 36 Md. 154; *Arbuter v. Day*, 30 Conn. 155; *Dixon v. Cook*, 47 Miss. 220; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Letcher v. Letcher*, 50 Mo. 137; *Washington Ins. Co. v. St. Mary's Seminary*, 52 Id. 480; *Harris v. Rathbun*, 2 Abb. (N. Y.) App. Dec. 326; *Johnson v. Pollock*, 58 Ill. 151; *McClelland v. James*, 33 Iowa, 571.

ancient, as well as the advantages of the modern system, it will be necessary to examine those principles.

**III.** All rules respecting judicial evidence may be divided into primary and secondary; the former relating to the *quid* propandum, or thing to be proved, the latter to the *modus* propandi, or mode of proving it. Of the former there are but three: 1st. That the evidence adduced must be directed solely to the matters in dispute; 2nd. That the burden of proof lies on the party who would be defeated, supposing evidence were not given on either side; and 3rd. That it is sufficient for the party on whom the burden lies, to prove the substance of the issue raised. These rules are so obviously reasonable and necessary for the administration of justice, that it would be difficult to find a system in which they have not at least a theoretical existence, however their effect may have occasionally have been extended or narrowed by artificial and technical reasoning; and accordingly they have always been recognized in our own. (*g*) The secondary rules are necessarily more numerous, but there are some almost as obvious and universal as the primary. Probably no code of laws

(*g*) That the proof should be confined to the issues raised, and consequently that the admissibility of evidence depends on the state of the pleadings, see Finch, Comm. Laws, 61; the cases from the Year Books collected in 2 Rol. Abr. 676, 677, pl. 8, 10, 11, 13, 14, 24, 28, &c.; and those put by Bradshawe, A. G. *arguendo*, in *Reniger v. Fogassa*, Plowd. 7. Again, that the burden of proof lies in general on the party who asserts the affirmative, has been a recognized maxim of law from the earliest periods, see Bract. lib. 4, c. 7, fol. 301 B.;

F. N. B. 106, H.; Co. Litt. 6 b; 2 Inst. 662; 4 Inst. 279; 3 Leon. 162, pl. 211; Gouldsb. 23, pl. 2; Anon., Littl. R. 36; and the maxim, "*actori incumbit onus probandi*," seems also to have been well known in former times; 4 Co. 71 b; Hob. 103. A case of the burden of proof shifting is given by Glanville, lib. 10, c. 12. Also, that it is sufficient to prove the substance of the issue, see Litt. ss. 483, 484, 485; 6 Edw. III. 41 b, pl. 22; 8 Edw. III. 70 a, pl. 37; Hob. 73, 81; Tryals per Pais, 140, Ed. 1665; Co. Litt. 227 a; 281 b, 282, a, &c.

ever existed which was destitute of its estoppels, presumptions, and oaths or other sanctions of truth, or which neglected to establish the great principle, so essential to the peace of society, that matters and claims which have been once regularly and judicially decided, must be considered as settled and not again be brought into dispute. Of all these likewise we find ample mention in our early books; (*h*) especially of estoppels, the doctrine of which, as observed by a late able writer, was once tortured into a variety of absurd refinements. (*i*)

112. Many of the other secondary rules of evidence are based on principles which, though quite as consonant to reason, and as much required for a perfect administration of justice, are not so obvious at first sight; and which, owing to the hardship of their enforcement in particular cases, and the great discretion required in their application, are sometimes apt to be disregarded. Among these may be reckoned the just principle, "*res inter alios acta alteri nocere non debet*,"—that persons are not to be affected by

(*h*) See Glanv. lib. 12, c. 24, who wrote in the reign of Hen. II.; Odo de Compton's Case, Memor. in Scac. 29 Edw. I.; 6 Edw. III. 45 a, pl. 31; and the title "Estoppel" in the indexes to our old books, beginning with the Year Book of Edw. II. As instances of presumptions, or intendments of law, noticed by ancient authorities, see Fleta, lib. 6, c. 34, §§ 4 and 5; Bract. lib. 1, c. 9, § 4; Litt. ss. 99 and 103; Co. Litt. 42 a and b, 67 b, 78 b, 99 a, 232 b, 373 a and b; 5 Co. 98 b; 6 Co. 76 a; 10 Co. 56 a; 12 Co. 4 and 5; Cro. Eliz. 292, pl. 2; Cro. Jac. 252, pl. 6, and 451, pl. 29; Cro. Car. 317, pl. 14, and 550, pl. 2. It is well known that during the middle ages oaths were in constant use, or

rather abuse, throughout Christendom, including this country, which always insisted on an oath as a test of truth, and had its judicial purgation under the name of wager of law. And with respect to the authority of *res judicata*: by the old statute, 4 Hen. 4, c. 23, it is ordained and established, that "after judgment given in the courts of our lord the king, the parties and their heirs shall be thereof in peace, until the judgment be annulled (anientiz) by attainr or by error, if there be error, as hath been used by the law in the times of the progenitors of our said lord the king." See also the stat. West, 2 (13 Edw. 1, stat. 1), c. 5, s. 2.

(*i*) 2 Smith's Lead. Cases, 607 4th ed.

the acts or words of others, to which they were neither party nor privy, and consequently had no power to prevent or control. We find this appealed to as a recognized maxim of law so early as the reign of Edward II. (*k*) Under this head comes the great principle, the strict enforcement of which (as has been already stated) (*l*) forms a distinguishing feature of the English law of evidence; namely, the rejection of all transmitted or derivative evidence—of all proof offered second-hand, or, *obstetricante manu*. We have seen the observations of Lord C. J. Abbott, as to that branch of this rule which relates to written instruments; (*m*) and with respect to hearsay or second-hand evidence in general, our ancient lawyers seem to have had a thorough perception of its

(*k*) M. 3 Edw. II. 53, tit. Entre. A writ of entry *ad terminum qui præterit* was brought, in which the demandant alleged that the tenant had right of entry only through A., his father, who leased to him the term, &c.; to which the tenant pleaded that the plaintiff was bastard, and could not claim as heir to A.; to which the demandant replied that he had formerly sued a writ against one C., who pleaded the bastardy of the demandant, who thereupon sued out a writ to the bishop of L.—, who certified to the court that he was mulier, &c. To this the tenant rejoined that he was no party to that proceeding, and *res inter alios acta aliis*, &c. To this it was answered that that maxim did not apply to such a case. The judges took time to consider until the next term, and then gave judgment, that as that court had been certified of the demandant's state of mulier by a certification, which was completed by a judgment given under that certification; and as he who is once mulier is mulier forever, no matter between

whom it be; they gave judgment that he was entitled to seisin, &c. See on this subject, Co. Litt. 352 b; 2 Smith's Lead. Cas. 614, 4th ed. The above case was decided exactly 350 years before the first case in *Siderfin*, while the reports of Keble begin a year later,—the two reporters whose authority on the subject of evidence Lord Mansfield, 1 W. Bl. 366, wished to consign to oblivion, on account of their antiquity. See also 2 Inst. 513. The rule "*res inter alios*, &c.," was well known at Rome. See Cod. lib. 7, tit. 60, ll. 1 and 2, in the latter of which it is spoken of as being "*notissimi juris*." *Infra*, bk. 3, pt. 2, c. 5.

(*l*) Introd. § 29, and *supra*, pt. 1, § 89. See *infra*, bk. 3, pt. 2, ch. 3 and 4.

(*m*) *Supra*, § 109. See Fleta, lib. 6, ch. 34, § 1, and 6 Mod. 248. This principle was also known to the Romans. Dig. lib. 22, tit. 4, l. 2, lib. 26, tit. 7, l. 57; Cod. lib. 4, tit. 21, ll. 5, 7, and 11; Domat, Lois Civiles, pt. 1 liv. 3, tit. 6, sect. 2, §§ x. and xi.



infirmity. (n) Thus, Sir Edward Coke, in the early part of the seventeenth century, lays down as a rule of law, "*Plus valet unus oculatus testis, quam auriti*

(n) It could hardly have been otherwise, as the infirmity of this kind of proof seems to have been observed in almost every age and country. According to the Athenian law hearsay evidence, or *ἀκοήν μαρτυρεῖν*, was allowed in cases where the supposed speaker was dead, and in some other instances (*Law Mag. (N. S.) No. 1, p. 36*). Hearsay appears to have been received in ancient Rome, Quint. lib. 5, cap. 7, at least as proof of old transactions (*Dig. lib. 22, tit. 3, l. 28, and lib. 39, tit. 3, l. 2, § 8*), although rumor and common report were estimated at their worth. "*Vanæ voces populi non sunt audiendæ; nec enim vocibus eorum credi oportet, quando aut noxium crimine absolvi, aut innocentem condemnari desiderat*" (*Cod. lib. 9, tit. 47, l. 12*). And on the value of hearsay when admitted, Quintilian in loc. cit. says, "*Gentium simul universarum elevata testimonia ab oratoribus scimus, et tota genera testimoniorum, ut de auditionibus; non enim ipsos esse testes, sed in juratorum afferre voces.*" Instead of in juratorum some copies have injuria- torum, which wholly alters the sense of the passage, but the other reading is adopted by an immense majority of the commentators. The civilians and canonists admitted hearsay in proof of ancient rights and in some other cases, but in general looked on it with suspicion (*Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 20; Mascardus de Prob. Concl. 101, 104; Struvius, Syntag. Jur. Civ. ed. Mülleri, Exerc. 28, tit. 45, note (7), ix. et seq.*). It is rejected in general by the Scotch law (*Burnett's Crim. Law Scotl. 600; 1 Dicks. Law Ev. in Scotl. 57 et seq.*); and, it is said, also by the Moham-

edan law, *Macnagh. Mo. Law, 259*). Under the old French law, Pothier expressly laid down: "Above all it is requisite that the witness who says he has a knowledge of any fact, should show how he has such knowledge. For instance, if I would prove that you had sold me such a thing, it would not be sufficient for the witness to say in vague terms, that he knew you had sold me that thing; he should state how he had that knowledge; for instance, that he was present at the agreement; or that he had heard you say you had made such a sale; if he said that he knew it from a third person, his deposition would not be any proof (*1 Ev. Poth. § 756*). Loysel, a very ancient French authority, significantly observes, "*Un seul œil a plus de crédit que deux oreilles n'ont d'audir*:" and again, "*Oùr dire va par ville, et en un muid de cuider n'y a point plein poing de savoir.*" In commenting on this, Bonnier, in his *Traité des Preuves, § 205*, observes, that a multitude of remarks of a similar nature have been made (by French lawyers, as it seems), but they are, after all, nothing more than cautions (indications), not positive precepts. And in another place he thus states the modern practice in France: "It is evident that proof weakens in proportion to its distance from its source. . . . We therefore ought never to have recourse to proofs of the second degree, when those of the first degree may be employed. . . . It is only when the direct witnesses are dead, or incapable of deposing, that witnesses of the second degree are allowed to be called, to reproduce the declaration of the first. Still, the very fact that it is no longer possible to

decem." "Testis de visu præponderat aliis." (o) So, the judges having held in the case of one William

hear the first, should induce the judge to examine carefully if there be any symptoms of fraud: for it is obvious that he who desires to injure without exposing himself to detection, will not fail to put a false statement in the mouth of some one from whom he cannot fear contradiction. A witness must be therefore doubly credible, in order to have reliance placed on his deposition when it only amounts to a hearsay; a fortiori, proof is extremely weak when we are obliged to follow out a line (*parcourir une filière*) more or less complicated, before we can arrive at the direct testimony. And yet in the celebrated prosecution of the Calases, the strongest piece of circumstantial evidence came under the cognizance of the judge, only through the medium of four witnesses, who had, as it was said, successively transmitted it from one to the other; and the first of those witnesses, the one who was supposed to have heard the threat uttered by the father to his son, was not even named, being an unknown girl whom it was impossible to find. While branding with just indignation proceedings where capital convictions were pronounced on such evidence, it must be acknowledged that public opinion alone can prevent a repetition of them. In this matter, as in everything else which concerns the appreciation of testimony, it is impossible to lay down fixed rules beforehand; for how can we determine a priori the precise point where truth begins and error ends?" (*Id.* §§ 728, 729). These observations, while they show the defects of the French judicial system, place in a strong light the excellence of our own. Such a case as that here referred to by Bonnier could hardly occur in England at the present

day; for, our rules which regulate the admissibility of evidence being rules of law, no judge ought to receive such proof; and were he to violate his duty, if not his oath, by so doing, still it would be for the jury, and not for him, to decide on its value, and pronounce the verdict of acquittal or condemnation. Nor did the principle in question escape the notice even of the rude legislators of the middle ages. Notwithstanding the widely-spread superstition which stamps with unquestionable veracity the statements of criminals at the place of execution, we find the following enactment in the Venedotian Code, or ancient code of North Wales, bk. 2, c. 4, § 11: "A thief at the gallows respecting his fellow-thieves: If he should assert that another person was an accessory with him in the robbery for which he is about to suffer; and he should persist in his assertion unto the state God went to and he is going to; his word is there decisive, and cannot be gained. nevertheless his fellow-thief shall not be executed, but is a saleable thief; for no person is to be executed on the word of another, if nothing be found on his person." The Dimetian Code, or ancient Code of West Wales, contains a similar provision (Bk. 2, c. 5, § 9). See for these Codes the "Ancient Laws and Institutes of Wales, &c." printed under the direction of the commissioners on the public records, 1841. It seems that the Hindu Code forms an exception; and that in that country the secondary witness, *i. e.*, the person who has been made acquainted with facts by hearsay, is as receivable as any other. Translation of Pootee, c. 3, s. 7, in Halhed's Code of Gentoo Laws. (o 4 Inst. 279.)

Thomas, that the statutes 1 Edw. 6, c. 12, s. 22, and 5 & 6 Edw. 6, c. 11, s. 12, which require that no person be proceeded against for treason except on the oath of two lawful accusers, were satisfied by the evidence of one person who spoke of his own knowledge, and that of another who had the information from a third, and he from a fourth, to whom the first had related it. (*p*) The same authority pronounces it "a strange conceit that one may be an accuser by hearsay;" and says that the doctrine was utterly denied by the judges in Lord Lumley's case, (*q*) H. 14 Eliz., a report of which he had seen in the handwriting of C. J. Dyer; (*r*) and Thomas's case is also mentioned by Sir Matthew Hale as overruled. (*s*) As our legal history advances, the authorities become more distinct on this subject, and the inconclusiveness of hearsay or second-hand evidence, seems to have been universally recognized during the latter half, at least, of the seventeenth century. (*t*) Instances are to be seen in the state prosecutions of that period; (*u*) and we sometimes find the objection taken even by persons not in the legal profession. Thus Archbishop Laud, in his defense, observes of some evidence offered against him, that it is "hearsay"; (*x*) and Lord William Russell, complaining on his trial that he thought he had very hard

(*p*) Thomas's Case, Dyer, 99 b, pl. 68, P. 1 Mar.

(*q*) 3 Inst. 25.

(*r*) Id. 24.

(*s*) 1 H. P. C. 306; 2 Id. 287. These authorities probably did not mean that the evidence of the second witness was to be rejected as coming second-hand; but that, being traceable up to the first witness, it was a mere repetition of his testimony, and consequently could not be considered

as the evidence of a second accuser, within the meaning of the statute. See Hale, in loc. cit., and 2 Hawk. P. C. c. 25, s. 141.

(*t*) Samson v. Yardly, 2 Keb. 223, (5) P. 19 Car. II.; Luttrell v. Reynell, 1 Mod. 282, and the authorities in the next three notes.

(*u*) 9 Ho. St. Tr. 608, 848, 1064; 12 Id. 1454.

(*x*) 4 Ho. St. Tr. 43<sup>r</sup>

measure, that there was brought against him a great deal of evidence by hearsay, (*y*) the court at once admitted the objection, but evaded its force in a way that will be shown presently, and in Mich. T. 19 Jac. I., the principle that the opinions of witnesses are not a legitimate ground for legal decision was recognized by the Star Chamber. (*z*)

113. Many other instances might be adduced, to show the recognition by our ancestors, of principles of evidence which we are in the habit of looking on as altogether modern. Even the rules of our forensic practice respecting proof were known to them; as that, at trials the party on whom the burden of proof lies ought to begin, (*a*) that leading interrogatories ought not to be put, &c. (*b*)

114. But although the germs of our law of evidence are thus traceable in the proceedings of our ancestors, they do not appear to have reduced its principles into a system, or invested them with the obligatory force essential to the steady and impartial administration of justice. Except in the case of *præsumptiones juris* which, being part of the law itself, it would have been manifestly improper to disregard, and in a few other instances, the principles of evidence were looked on as something merely directory, which judges and jurymen might follow or not at their discretion. The best illustration of this will be found in the practice relative to hearsay or second-hand evidence. We have seen that our ancient lawyers were perfectly aware of its weakness, but they did not think themselves called on to reject it absolutely. Thus in

(*y*) 9 Ho. St. Tr. 608.

(*z*) *Adams v. Canon*, reported in the margin of the edition of *1'yer's Reports*, 1688, 53 b, pl. 11.

(*a*) *Anon.*, Litt. R. 36; *Heidon v. Ibgrave*, 3 Leon. 162, pl. 211; *Gouldsb* 23, pl. 2.

(*b*) 4 Inst. 279.

Rolfe v. Hampden, T. 34 Hen. VIII., (c) in order to support a will of land, contained in an ancient paper writing (before the statute of frauds), the testimony of three witnesses was received, one of whom spoke of his own knowledge, the rest on the report of others; and L. C. J. Dyer, by whom the case is reported, saw nothing extraordinary in this, but observes, "the jury paid little regard to the aforesaid testimony." And at a later period the courts seem to have thought that, although hearsay was not evidence in itself, it might be used to introduce, explain, or corroborate more regular proof. (d)

115. Instances are, however, to be found in the state trials, previous to the revolution of 1688, of decisions going much beyond this, and the key to which lies in a circumstance commonly overlooked. So long as the judges believed that it was discretionary with them to enforce or disregard the received principles of evidence, it is natural to suppose that, with the high prerogative notions of those times, and dependent as they were on the crown, they would exercise that discretion in favor of the crown, and carefully avoid laying down any general rules which might fetter the executive in proceeding against state criminals. Accordingly we find that, in the sixteenth and early part of the seventeenth centuries, it was an open and avowed principle, that the rules of evidence and practice in prosecutions for high treason, and perhaps for felony also, were different from those followed in ordinary cases. (e) Thus, although by the established usage of the common law from the earliest times, witnesses were sworn, examined, and cross-examined in open

(c) Dyer, 53 b, pl. 11.

(e) See 2 Hawk. P. C. c. 46, s. 9.

(d) 2 Hawk. P. C. c. 46, s. 14, ed. and the authorities in the following 1716; Bac. Abr. Evid. K., ed. 1736; not's. Trials per Pais, 389, 390; 1 Mod. 283.

court, the judges refused to compel their personal appearance in cases of treason, (*f*) holding that it would be opening a gap for the destruction of the king, &c. (*g*) The consequence of establishing this distinction was, that on charges of that nature, not only was the loosest and most dangerous evidence received, but the entire proceedings were conducted in a way which set at defiance every principle of fairness and justice. "Throughout the state trials before the time of the commonwealth," observes Mr. Phillipps, (*h*) "the worst species of hearsay was constantly received; such as the examinations of persons who might have been produced as witnesses, or who had been convicted of capital offenses, or who had signed confessions in the presence only of the officers of government, and under the torture of the rack." Thus, in the case of Sir Nicholas Throckmorton, (*i*) the principal evidence was the deposition of a person already convicted of treason, and whose execution had been respited from time to time in order to induce him to accuse the prisoner. (*k*) And among many flagrant misinterpretations of the law in favor of the crown and against the prisoner, of which that trial is full, the court unblushingly declared that the words in the statute of treason, 25 Edw. 3, c. 2, stat. 5, that persons accused of treason should "thereof be proveably attainted of open deed, by people of their condition," meant that they should be attainted, not by verdict of a jury, but by the evidence of persons already attainted, who de-

(*f*) Staundf. P. C. 164.

(*g*) Sir Walter Raleigh's Case, 2 Ho. St. Tr. 19. Hallam, in his Constitutional History of England, vol. 2, p. 148, 2nd ed., speaking of the trial of the Earl of Strafford, says, that "in that age the rules of evidence, so

scrupulously defined since, were either very imperfectly recognized, or continually transgressed."

(*h*) 1 Ph. Ev. 166, 10th ed.

(*i*) 1 Ho. St. Tr. 865.

(*k*) 1 Ph. Ev. 166, 10th ed.

clare the accused participators in their treason, and are thus "people of their condition." (*l*) After the Restoration matters seem to have mended; the witnesses appeared in person, but the practice of admitting proof at second-hand continued—the judges acknowledging that it was not evidence, and promising to tell the jury so. (*m*) Thus, in *Langhorn's Case*, 31 Car. II., (*n*) *Atkins, J.*, interposed while a witness was giving his testimony. "That is no evidence against the prisoner, because it is by hearsay;" and *Scroggs, C. J.*, added, "It is right, and the jury ought to take notice, that what another man said is no evidence against the prisoner, for nothing will be evidence against him but what is of his own knowledge." Notwithstanding this language, to quote again from *Mr. Phillipps*, (*o*) "On the trials for the Popish plot, the evidence consisted principally of a narrative of the transactions of the supposed conspirators in various countries, collected during a long period of time from a multitude of letters, the contents of which were given from recollection; the witnesses not having taken a note of any part of the letters at the time of reading, not having read them for a great number of years, nor having been required in reading to notice their contents, and not producing one of the letters, or a copy, or even an extract."

**116.** The system known in practice by the title of the "Law of Evidence," began to form about the

(*l*) 1 Ho. St. Tr. 889.

(*m*) See *Langhorn's Case*, 7 Ho. St. Tr. 441; *Lord William Russell's Case*, 9 Id. 608; *Algernon Sidney's Case*, Id. 848; *Charnock's Case*, 12 Id. 1414 and 1454.

(*n*) 7 Ho. St. Tr. 441.

(*o*) 1 Ph. Ev. 166, 10th ed. From the above observations it follows that

too much reliance must be placed on the valuable work called "The State Trials," as presenting a correct picture of the ordinary practice of English tribunals before the Revolution. It should not be forgotten that most of the cases there reported were prosecutions for high treason, and took place in times of great excitement.

middle of the seventeenth century,—at least this is sufficiently accurate for a general view. The characteristic feature which distinguishes it, both from our own ancient system and those of most other nations, is, that its rules of evidence, both primary and secondary, are in general rules of law ; which are not to be enforced or relaxed at the discretion of judges, but are as binding on the court, juries, litigants, and witnesses, as the rest of the common and statute law of the land ; and that it is only in the *forsensis* procedure which regulates the manner and order of offering, accepting, and rejecting evidence, that a discretionary power, and even that a limited one, is vested in the bench. A judge, consequently, has now no more right to receive prohibited evidence, because he thinks that by so doing justice will be advanced in the particular case, than he has to suspend the operation of the Statute of Mortmain, or to refuse to permit an heir-at-law to recover in ejectment, because it appears that he is amply provided for without the land in dispute. It must not, however, be supposed that this great principle became established all at once ; and indeed the gradual development of our system of judicial evidence, from the above epoch to the present day, may be studied alike with advantage and pleasure. To point out the various improvements and alterations that have from time to time been effected in it, by the courts and the legislature, would far exceed the limits of a mere sketch of its progress. It will therefore be sufficient to glance at a few particulars ; and we shall proceed in the first place with the history, during that period, of the rule rejecting hearsay evidence.

117. Although, as already stated, the infirmity of hearsay evidence was generally acknowledged in the



reign of Charles II.; (*p*) yet Sir Matthew Hale gave it as his opinion, that where a rape was committed on a child of tender years, the court might receive, as evidence, the child's narrative of the transaction to her mother or other relations. (*q*) At the beginning of the eighteenth century, Sergeant Hawkins only ventures to lay down the rule thus: (*r*) "It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner;" and similar language is used in Bacon's Abridgment. (*s*) Lord Chief Baron Gilbert also, in his Treatise on the Law of Evidence, composed about the same time, being, it is believed, the earliest on the subject, lays down that "a mere hearsay is no evidence;" (*t*) "but though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness's testimony, to show that he affirmed the same thing before on other occasions, and that the witness is still consistent with himself." (*u*) Still, in 1754, on the trial of Elizabeth Canning for perjury, we find some rather elaborately got up evidence tendered and rejected by the bench, the nature of which seems to show, that the rule against hearsay was not then generally understood by the legal profession. (*v*) Towards the end of the eighteenth century, however, the text writers speak of the rule as established; (*x*) but while recognized as obligatory, it was not extended to all the cases which fall within its principle. Thus, in 1779, on a trial for assault with intent to ravish a very young child, we find Buller, J. (himself the author of a treatise on *Nisi Prius*), adopting the

(*p*) See *ante*, §§ 112, 115.

(*q*) 1 Hale, P. C. 634, 635.

(*r*) 2 Hawk. P. C. c. 46, s. 14, ed.

1716.

(*s*) Bac. Abr. Evid. (K), ed. 1735.

(*t*) Gilb. Ev. 149, 4th ed.

(*u*) Id. 150.

(*v*) 19 Ho. St. Tr. 342, 343.

(*x*) Bull. N. P. 294. 2 Fonb. Eq.

450.

course advised by Sir Matthew Hale about a century before, by receiving as evidence the information relative to the transaction which the child, who was not examined as a witness, had given to two other persons. The point having been reserved, this course was condemned by all the judges; and a definite rule relative to the testimony of children laid down for the future. (*y*) Notwithstanding which, it is said that on the trial, in the year 1808, of an indictment for a rape on a child five years old, the same objectionable kind of evidence was again received; but, the question having been reserved, the judges, as might be expected, thought the evidence clearly inadmissible. (*z*) And an approved treatise of the present day informs us, that so late as the year 1790, there appears to have been no settled rule against the admission of hearsay evidence, with regard to depositions taken before magistrates (whether upon criminal charges or upon other occasions); and several of the exceptions to this rule, which were formerly allowed, have been much narrowed within very modern times. (*a*) The authors who have written on evidence during the current century, all speak of the rule rejecting hearsay evidence as established and notorious. (*b*)

**118.** Other parts of the law of evidence are marked by similar improvement during the last and present centuries. The enlightened principle, that judicial oaths are not to be rejected on account of the witness holding erroneous notions on religion, provided a mode of swearing be found which he consi-

(*y*) *R. v. Brazier*, 1 Leach, C. L. 199.

(*z*) *R. v. Tucker*, MS.; cited Ph. & Am. Ev. 6, and 1 Ph. Ev. 10, 10th ed.

(*a*) 1 Ph. Ev. 165-6, 10th ed. See *Higham v. Ridgway*, 10 East, 109, and

the cases there referred to; *R. v. Eriswell*, 3 T. R. 707; *R. v. Chadderton* 2 East, 27; *R. v. Frystone*, Id. 54; *R. v. Abergwilly*, Id. 63.

(*b*) 2 Ev. Poth. 283, 284; and see any of the modern treatises.

ders binding on his conscience, was fully established by the great case of *Omychund v. Barker*, in 1745. (*c*) In later times also, relief has been given to particular classes of persons, who object on conscientious grounds to taking oaths in any shape. (*d*) So, the incompetency of witnesses on the ground of interest, was extracted from the chaos of conflicting authority in which it lay involved, and placed on at least an intelligible footing, by the case of *Bent v. Baker*, (*e*) in 1789, and other decisions of that period. In our own time this latter subject has attracted much attention—the doctrine of the incompetency of witnesses having been attacked in toto as improper and mischievous, (*f*) and being now almost annihilated. (*g*) By various recent statutes also, many species of documents have been invested with the character of public documents, and made evidence against all persons, of the facts which they record or attest; (*h*) the proof of public documents in general has been rendered more simple and less expensive; (*i*) proof of certain things which it may fairly be deemed needless to prove, has been dispensed with; (*k*) liberal powers of amending variances at trials have been vested in tribunals; (*l*) and more effective means have been afforded to litigants, of getting at evidence in the custody or

(*c*) 1 Atk. 21; Willes, 538; 1 Wils. 84.

(*d*) *Infra*, bk. 2, pt. 1, ch. 2.

(*e*) 3 T. R. 27. See P. H. & Am. Ev. 74, 75.

(*f*) Benth. Jud. Ev, vol. i. 1-15; vol. v. 1-191, &c., &c.; Taylor, Ev. §§ 1210 et seq., 4th ed. See this subject considered—*infra*, bk. 2, pt. 1, ch. 2.

(*g*) *Infra*, bk. 2, pt. 1, ch. 2.

(*h*) 8 & 9 Vict. c. 16; 14 & 15 Vict.

c. 99; 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 67, &c.

(*i*) 8 & 9 Vict. c. 113; 14 & 15 Vict. cc. 99 and 100; 17 & 18 Vict. c. 104, ss. 107, 138, 175, N. 3, 249, 277; 18 & 19 Vict. c. 91, s. 15; 20 & 21 Vict. c. 77, s. 91; 31 & 32 Vict. cc. 37 and 54; 36 & 37 Vict. c. 33.

(*k*) 8 & 9 Vict. c. 113; 11 & 12 Vict. c. 42, s. 17; 14 & 15 Vict. c. 99; 17 & 18 Vict. c. 104, s. 270, &c.

(*l*) *Infra*, bk. 3, pt. 1, ch. 3.

under the control of the opposite party. (*m*) And, lastly, by "The Common Law Procedure Act, 1854," (*n*) various anomalies have been removed from the forensic procedure affecting our law of evidence, and the system itself brought more into harmony with its own principles. The value of this statute was much impaired by its operation being confined to the evidence given in civil cases; (*o*) but this was remedied by the 24 & 25 Vict. c. 66, the 28 Vict. c. 18, and the 32 & 33 Vict. c. 68.

While these alterations must on the whole be viewed as improvements, it may be a question, whether they have not in some cases been carried too far. The principle which attaches so much faith to public documents, for instance, rests in a great degree on the rule,—"*Omnia præsumuntur rite esse acta*,"—a maxim unquestionably just when restrained within its due limits, but which loses much of its force when the document is only of a quasi public nature, *i. e.*, drawn up by individuals acting in some sense, indeed, on the part of the public, but having a personal interest in the existence of the facts they profess to record or attest. And there is another maxim equally valuable which must not be lost sight of,—"*Res inter alios acta alteri nocere non debet*." In one instance, at least—that relating to entries in the official log-books of merchant ships—the legislature found it necessary to retrace its steps in this respect; (*p*) and

(*m*) 14 & 15 Vict. c. 99, s. 6; 17 & 18 Vict. c. 125, ss. 50, 51 et seq.; 36 & 37 Vict. c. 66, sched. Rules 25–27.

(*n*) 17 & 18 Vict. c. 125; ss. 22–27.  
 (*o*) Sect. 103.

(*p*) See the 13 & 14 Vict. c. 93, ss. 85–93, and the alterations introduced by the amending act, 14 & 15 Vict. c.

96, s. 27. Both these statutes are repealed by the 17 & 18 Vict. c. 120; and by the merchant shipping act, 17 & 18 Vict. c. 104, ss. 244 and 285, the provisions in the 14 & 15 Vict. c. 96, s. 27, as to the admissibility in evidence of the official log-books of merchant vessels, have been re-enacted with still further improvements.

several cases illustrate the danger of the enactments in the 8 & 9 Vict. c. 16, s. 28, and 25 & 26 Vict. c. 89, s. 37, which, in an action by a railway company for calls, render the register of shareholders *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares. (*q*)

**119.** The slow development of the law of evidence, compared with that of the other branches of our jurisprudence, seems a natural consequence of the general principle, that in every nation the substantive rules of law arrive at maturity before the adjective. The reason is obvious. Rules defining the rights of persons and property, or creating offenses assigning their punishment, are almost coeval with the existence of civil society; while the procedure, or mode of enforcing rights and carrying the sanctions of penal law into effect, are usually left for a long time, and to a certain extent ever must be left, to the discretion of the persons intrusted with the administration of justice. But our modern system of evidence probably owes its establishment to the following secondary causes:—1. The independence of the judges of the crown, begun by the 12 & 13 Will. 3, c. 2, s. 3, and completed by the 1 Geo. 3, c. 23, which naturally had a considerable effect in preventing artificial distinctions being made, between the proofs in state prosecutions and in other cases. 2. The allowing to persons accused of treason or felony, the right of being defended by counsel; (*r*) the necessary consequence of which

(*q*) *Waterford Railway Company v. Pidcock*, 8 Exch. 279; *Nixon v. Brownlow*, 3 H. & N. 686. In *Darby v. Ouseley*, 2 Jurist, N. S. 497, 499, Pollock, C. B. said, that there were many instances of the names of persons having been inserted without

their knowledge in the books of railway companies.

(*r*) In treason, by 7 & 8 Will. 3, c. 3, s. 1; and 20 Geo. 2, c. 30. Although persons accused of felony were not allowed to make their full defense by counsel until the 6 & 7 Will. 4, c.

was, that objections to the admissibility of evidence were much more frequently taken, the attention of the judges was more directed to the subject of evidence, their judgments were better considered, and their decisions more fully reported, and better remembered. 3. And principally, the gradual change effected in the constitution of the common-law tribunal for the trial of matters of fact. As Sergeant Stephen observes, "It is a matter clear beyond dispute (but one that has perhaps been too little noticed in works that treat of the origin of our laws) that the jury anciently consisted of persons who were witnesses to the facts, or at least in some measure personally cognizant of them; and who, consequently, in their verdict gave, not (as now) the conclusion of their judgment upon facts proved before them in the cause—but their testimony as to facts which they had antecedently known." (s). This circumstance, which is a key to so many of the common-law rules of pleading, will throw

114, yet for a long time before that statute, counsel were allowed to take and to argue legal objections for them, and even by connivance to examine and cross-examine witnesses. See bk. 4, pt. 1.

(s) Steph. Plead. 145, 5th ed. See also Id. 480, and Append. note 33. To his authorities, which are indeed conclusive enough on this matter, we add the following: It was agreed by the court, in *Rolfe v. Hampden*, T. 34 Hen. VIII. Dyer, 53 b, pl. 11, that the plaintiff in attaint could not give more evidence nor call more witnesses than he had given to the petit jury, but *à contra* the defendant might give more in affirmance of the first verdict. The functions of jurors and the distinction between them and other witnesses is strikingly pointed out in 23 Ass. pl. 11.

It was proposed to challenge a witness to a deed because he was cousin to the plaintiff. "Et non allocatur, for the witnesses are not challengeable, because the verdict shall not be received from them, but from those of the assize, and the witnesses were sworn simply to say the truth, without saying to their knowledge (a leur estient), for they ought to testify nothing but what they see and hear." The same was held in the 12 Ass. pl. 11 & 41, in the former of which we are told, "The assize (the jury) came and were charged to say the truth of their knowledge (a leur science), and the witnesses without their knowledge (sans leur scient), to say the truth and loyally inform the inquest." See also 11 Ass. pl. 19.

considerable light on our system of judicial evidence. That the jury were witnesses of a particular kind, at least as late as the reign of Edw. I., and that they had ceased to be such in that of Charles II., perhaps much sooner, is indisputable. But in the meantime the system was in a sort of transition state ; (†) and it was

(†) The authorities in the last note show this stood in the time of our early Plantagenet monarchs ; the celebrated judgment of Vaughan, C. J., in Bushell's Case (Vaugh. 135), fixes the practice in the latter part of the seventeenth century, nearly as it exists at the present day. The difficulty is to trace its progress in the intervening period. Fortescue (*De Laud. Leg. Ang.* cc. 26, 32), towards the close of the fifteenth century, considers the jury in the light of witnesses. Vavisor, J., a little later, in the 14<sup>th</sup> Hen. VII. 29 b, pl. 4, 2 Rol. Abr. 677, pl. 27 ; and Brooke, recorder of London, arguing, in the middle of the next century, *Reniger v. Fogassa*, Plowd. 12, H. 4 Edw. VI., state it as clear that a jury may find their verdict without any evidence laid before them. So Staundf. P. C. 130 a, speaking of the stat. 1 Edw. 6. c. 12, says, "Mes bien garda le iuge, quant tielx parolx sont mises in lenditement, que ceux qui donont evidence, les dites parolx bie et substantialment prouont per lour evidence, aui uant come le principal fact, et sils ne font, lessa le iuge admonisher le iury de ceo, s. queil ny ad ascun prooffe de tielx polx per le evidence, et per tant nient tenus de le trouver, sils ne conusteront c de eux mesmes." "Albeit by the common law," says Sir Edward Coke (3 Inst. 163), "trial of matters of fact is by the verdict of twelve men, &c., and deposition of witnesses is but evidenced to them ; yet, for that most commonly juries are led by deposition of wit-

nesses, &c." So late as the 17 Jac. I. (1619), Hobart, C. J., says (*Darcy v. Leigh*, Hob. 325), that he "observed that the wisdom of the common law did allow none to be a juryman in ætate probanda, that was not forty-two years ; for he tried things twenty-one years past, and is not to be a juror till he be twenty-one years." And in Style's *Prac. Reg.* 335, 4th ed., "A jury may find a thing which is not given unto them in evidence, if they do know it of their own knowledge (*M. 22 Car. B. R.*). For they may inform themselves of the truth of the fact they are to try, by all possible and lawful means they can, and are not solely tied to the evidence given at the bar." On the other hand, however, we find a case of *Lee v. Saville*, in Clayton's *Pleas of Assize*, 31, pl. 54, *Summer Assizes*, 11 Car. I. (1635), where it is stated that "the judge" (Barkley) "did put back the jury twice because they offered their verdict contrary to their evidence." The following case is reported in 1 Lilly, *Pr. Reg.* 552 : "If any one of the jury that is sworn to try the issue be desired to give his testimony concerning some matter of fact that lies in his particular knowledge, and concerns the matter in question, as evidence to his fellow-jurors, the court will have him examined openly in court upon his oath touching his knowledge therein, and he is not to deliver his testimony in private unto his fellow-jurors (31 Oct. 1650, *Mich. B. S.*, &c.). And in *Wood v. Gunston*, M. 1655, *Sty.* 466, referred

not until the final determination of that state that the rules of evidence, which depend so much on the functions of the component parts of the judicial tribunal being clearly defined, could assume a permanent and consistent form. Other causes may have contributed, and indeed the above are only offered in the way of speculation.

120. But, whatever the age or origin of our system of judicial evidence, it is on the whole a noble one, and may fearlessly challenge comparison with all others. Its principal features stand out in strong and fine relief, whilst its leading rules are based on the most indisputable principles of truth and common sense. It must not, however, even with all the improvements of modern legislation, be supposed perfect; on the contrary, it still has defects which its well-wishers behold with regret. The application of its great rules having occasionally fallen to the lot of unskillful or careless hands, the general outline has been in some places badly filled up, lines cross that ought to bound the domain of principles just in themselves, and the extension of which to cases where they are

to in *Roe v. Hawkes*, 1 Lev. 97, a motion for a new trial having been made on the ground of excessive damages, and that the jury had favored the plaintiff, it was objected, that "after verdict the partiality of the jury ought not to be questioned, nor is there any precedent for it in our books of the law, and it would be of dangerous consequence if it should be suffered, and the greatness of the damages given can be no cause for a new trial;" but Glyn, C. J., said, "It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial and not an arbitrary discretion. and it is frequent

in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them; and it is for the people's benefit that it should be so, for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent between them, but it cannot be so intended of the court." In *Baily v. Boorne*, 1 Str. 392, however, the court said the power of granting a new trial, even superior courts, "is not of any great standing, the first instance of any new trial being in *Stiles*." These authorities are far from exhausting the subject, but it is needless to discuss it further.



inapplicable has frequently been productive of injustice, and has exposed the whole system to censure. Add to this, that the comparatively modern growth of the system, has rendered it impossible to get rid at once either of all the erroneous principles, or of the many straight-laced applications of sound ones, which were established by our ancestors for themselves, or borrowed from the civilians of the middle ages.

121. But besides these imperfections, which perhaps may be looked on as adventitious, our system has faults of a more positive kind. Thus, sufficient attention was not paid by its founders to official pre-appointed evidence. And although some steps have been taken in this direction—*e. g.*, by the 6 & 7 Will. 4, c. 86, and subsequent statutes for the registration of births, marriages, and deaths; by the 1 & 2 Vict. c. 110, s. 9, and the 32 & 33 Vict. c. 62, s. 24, requiring professional attestation to cognovits and warrants of attorney to confess judgment; by various clauses of the merchant shipping act, 17 & 18 Vict. c. 104; (*u*) and by the 20 & 21 Vict. c. 77, s. 91, establishing depositories for the wills of living persons, &c.—there is still room for improvement; and the principles adopted in the laws of some foreign countries on this subject might, under due restrictions and with the required caution, be advantageously introduced here. Another defect of our system is the want of some cheap and expeditious means of perpetuating testimony. “*Id observandum, aliquando hodie probationem suscipi ante litem contestatam, si reus prævideat, se conventum iri, et periculum sit, ne testes, quibus exceptionem suam judici probare queat, moriantur vel alio migrent, vel si actor metuat, ne sibi testimonium propter testium morbum, vel absentiam*

(*u*) Sects. 107, 138, 175, n. 3, &c.

pereat. *Id quod doctores vocant probationem in perpetuam rei memoriam.*" (*v*) With the exception of the writs of "*warrantia chartæ*," (*x*) "*curiâ claudendâ*" (*y*) (both abolished by the 3 & 4 Will. 4, c. 27, s. 36), and a few other instances, the common law did not allow legal proceedings on the mere suspicion of intended wrong or breach of duty; and it was probably in furtherance of this principle that it provided no general mode of perpetuating testimony, for which purpose it was necessary to have recourse to a bill in equity. (*z*) But that process was circuitous, expensive, and frequently inadequate; the result of which, doubtless, was that much valuable evidence was daily carried to the grave. It is, however, much easier to detect the disease than to point out the fitting remedy; and the difficulty of this subject has been felt by the lawgivers of other countries as well as our own. (*a*) Steps in advance, however, were taken by the 5 & 6 Vict. c. 69, (*b*) and 30 & 31 Vict. c. 35, s. 6; (*c*) by the Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 448, 449, relative to taking the examination of persons belonging to ships in distress; by the 21 & 22 Vict. c. 93, which enables persons to establish their legitimacy, and the marriage of their parents and others from whom they may be descended, and to prove their own right to be deemed natural-born subjects; and by the annual Mutiny Act (*d*) as to the

(*v*) Heinec. ad Pand. pars 4, § 125.

(*x*) F. N. B. 134 K, 8th ed

(*y*) F. N. B. 127 I. in marg. 8th ed.

(*z*) 3 Blackst. Comm. 450; Com. Dig. Chancery R.; 2 Phill. Ev. 453, 10th ed.

(*a*) See Domat, Lois Civiles, part 1, liv. 3, tit. 6, sect. 3.

(*b*) The object of which was to extend the means of perpetuating

testimony in suits touching honors, titles, &c., or estates or interests in property, real or personal, the right or claim to which could not be brought to trial before the happening of some future event.

(*c*) Passed to extend the means of perpetuating testimony in criminal cases.

(*d*) See the act of the present session, 37 Vict. c. 4, s. 92.

mode of recording a soldier's settlement. And now, by the "Supreme Court of Judicature Act, 1873," (*e*) "the court or a judge may, in all cases where it shall appear necessary for the purposes of justice, make any order for the examination upon oath, before any officer of the court, or any other person or persons, and at any place, of any witness or person; and may order any deposition so taken to be filed in the court; and may empower any party to any action or other proceeding, to give such deposition in evidence therein, on such terms, if any, as the court or a judge may direct."

122. Finally, the nomenclature of this branch of our jurisprudence is somewhat objectionable; a greater evil than might at first sight be imagined. Among the abuses of words, one of our ablest metaphysicians classes their unsteady application, and an affected obscurity by their wrong application. (*f*) And Lord Bacon shrewdly remarks, "Although we think we govern our words, and prescribe it well 'loquendum ut vulgus, sentiendum ut sapientes,' yet certain it is that words, as a Tartar's bow, do shoot back upon the understanding of the wisest, and mightily entangle and pervert the judgment." (*g*) Several important phrases in the law of evidence, such as "presumption," "best evidence," "written evidence," "hearsay evidence," "parol evidence," &c., have two, and some even more different significations; and many idle arguments and erroneous decisions to be found in our books, are clearly traceable to this ambiguity of language.

(*e*) 36 & 37 Vict. c. 66, Sched. Rule 45. (*g*) Bacon's *Advancement of Learning*, bk. 2.

(*f*) Locke on the Human Understanding, bk. 3, ch. 10, §§ 5, 6.

## BOOK II.

### INSTRUMENTS OF EVIDENCE.

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**123.** By “Instruments of Evidence” are meant the media through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal. (*a*) The word “instrument” has, however, both with ourselves and the civilians, a secondary sense, *i. e.* denoting a particular kind of document. (*b*) These instruments of evidence are of three kinds:

1. “Witnesses”—persons who inform the tribunal respecting facts.
2. “Real Evidence”—evidence from things.
3. “Documents”—evidence supplied by material substances, on which the existence of things is recorded by conventional marks or symbols. Although in natural order the subject of real evidence precedes that of witnesses, it will be more convenient to treat of the latter first, as it is by means of witnesses that both real and documentary evidence are usually presented to the tribunal.

(*a*) “Instrumentorum nomine ea habentur.” Dig. lib. 22, tit. 4, omnia accipienda sunt, quibus causa l. 1.

instrui potest: et ideo tam testimonia, (*b*) See *infra*, pt. 3, and Heinec. ad Pand. pars 4, § 126.

## PART I.

## WITNESSES.

	PARAGRAPH
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124. A witness may be defined, a person who gives evidence to a judicial tribunal. (*a*) The term is also sometimes used in the sense of testimony, as when a witness is said to be “an evidence” for or against a party. This form of speech is, however, passing away, and is rarely used, except when a criminal is admitted to bear testimony against his accomplices, who is then said to turn “Queen’s evidence.” In dealing with this subject, we propose to consider—

1. What persons are compellable to give evidence.
2. The incompetency of witnesses; or who are disqualified from giving evidence.
3. The grounds of suspicion of testimony.

(*a*) “Witness” seems perfectly synonymous with the Latin “testis,” the etymology of which is somewhat difficult to trace. Ainsworth in his Latin Dictionary says, etym. in obscuro: but Stephan. Thesaurus Ling. Lat. says it is “ab eo dictus quod tueatur statum causæ: vel quod ante stet, quasi antestis, id est antestans.” The “licet antestari” in Horace (Sat. lib. 1, 9) certainly gives some color to this latter supposition, which is followed by most of the civilians. See Calvin’s *Lexicon Juridicum*; Oldendorp’s *Lexicon Juris*; Spiegelius’s *Lexicon Juris*

Civilis. The silence of our Law Dictionaries as to the derivation of “witness” is also remarkable. Sir Edward Coke (4 Inst. 279) says it comes from the Saxon verb “weten” (probably a mistake for witan), “Scire, quia de quibus sciunt testari debent, et omne sacramentum debet esse certæ scientiæ.” The derivations given by this author are rather unsafe; but the Dictionaries of Bailey, Johnson, Richardson, and Webster, all agree that “witness” is of Saxon origin and we still have the phrase “to wit.”

## CHAPTER I.

## WHAT PERSONS ARE COMPELLABLE TO GIVE EVIDENCE.

	PARAGRAPH
Generally, all persons are compellable to give evidence . . . .	125
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**125.** The law allows no excuse for withholding evidence which is relevant to the matters in question before its tribunals, and is not protected from disclosure by some principle of legal policy. A person, therefore, who, without just cause absents himself from a trial, at which he has been duly summoned to attend as a witness; or a witness who refuses to give evidence, or to answer questions which the court rules proper to be answered, is liable to punishment for contempt. (*a*) An exception exists in the case of

(*a*) The following case has been put in illustration of the universality of this rule:—"Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor to be passing in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper and the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No!

most certainly not" (Bentham's Draft of a Code for the Organization of the Judicial Establishment in France, A. D. 1790, chap. I, tit. 1). "We remember one case," says a writer in a legal periodical, "a prosecution for blasphemy, in which the defendant, by way of showing the divided state of opinion on theological subjects, actually subpoenaed the heads of all the religious persuasions he could hear of, and when the day of trial arrived

The Sovereign, against whom, of course, no compulsory process of any kind can be used. (*b*)

126. Various matters which are privileged from disclosure on general grounds of public policy, will be considered in another part of this work. (*c*) But, besides these, the law extends a personal privilege to witnesses, of declining to answer particular questions,—a privilege based on the principle of encouraging all persons to come forward with evidence in courts of justice, by protecting them as far as possible from injury or needless annoyance in consequence of so doing. It is, therefore, a settled rule, that a witness is not to be compelled to answer any question, the answering of which has a tendency to expose him to a criminal prosecution, or to proceedings for a penalty, or for a forfeiture even of an estate or interest. “*Nemo tenetur seipsum accusare.*” (*d*) “*Nemo tenetur seipsum prodere.*” (*e*) This is laid down in all our books, (*f*) is the established practice of the courts, and is recognized by the stat. 46 Geo. 3, c. 37; (*g*) 26 & 27 Vict. c. 29, s. 7, &c. By 1 Will. 4, c. 22, s. 5 and 6 & 7 Vict. c. 82, s. 7, no witness examined under a commission shall be compelled to produce any writing or other document that he would not be compellable to produce at a trial, &c.; and the 14 & 15 Vict.

these found themselves all shuffled up together in the waiting-room—the Archbishop of Canterbury and the High Priest of the Jews being of the party” (Law Mag. vol. 25, p. 364). When the Emperor Napoleon the First was on board the *Bellerophon* in the English waters, an attempt was made to detain him in this country by means of a subpoena to give evidence on a trial, but which it was found impossible to serve. *Scott's Life of Napoleon*, vol. 9, p. 96.

(*b*) See *infra*, chap. 2.

(*c*) Bk. 3, pt. 2, ch. 8.

(*d*) Hard. 139; Wing. Max. 486, Lofft. Max. 361; 10 Exch. 88; 3 H. & N. 363.

(*e*) 3 Bulst. 50; 4 Black. C. 296; 3 Mac. & G. 212; 10 Exch. 93; 2 Den. C. C. 434.

(*f*) Ph. & Am. Ev. 913, 914, 916; Tayl. Ev. § 1308, 5th ed; Stark Ev 204, 4th ed.

(*g*) See that statute, *infra*

c. 99, which (sect. 2) renders the parties to a cause competent and compellable to give evidence according to the practice of the court; expressly provides (sect. 3) that nothing therein contained "shall render any person compellable to answer any question tending to criminate himself." (*h*) The 19 & 20 Vict. c. 113, s. 5,—for taking evidence here in relation to certain matters pending before foreign tribunals,—enacts that every person examined under it, "shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause, &c., would be entitled to;" and a similar provision is contained in the 22 Vict. c. 20, s. 4,—for taking evidence in proceedings pending before tribunals in the Queen's dominions, in places out of their jurisdiction,—with reference to persons examined under that act. And lastly, it is provided by the 32 & 33 Vict. c. 68, s. 3, that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question, tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery. (*i*)

Whether a husband or wife is bound to answer questions tending to criminate each other seems unsettled. (*j*)<sup>1</sup>

(*h*) The peculiar language of this section has given rise to the question, whether, when a party to a suit is examined as a witness, his privilege in not answering questions is not more limited than that of other witnesses, and is confined to the case where the answer would tend to criminate him. *Tayl. Ev.* § 1217, 5th ed; *May v. Hæwkins*, 11 Exch. 210; 1 Jurist, N. S. 600.

(*i*) The legislature has also recognized the principle on several other occasions, either by depriving particular witnesses of the privilege, or by an act of indemnity rendering it valueless to them (*Tayl. Ev.* § 1310, 5th ed.) where various instances are collected.

(*j*) See *R. v. The Inhabitants of Cliviger*, 2 T. R. 263; *R. v. The Inhabitants of All Saints, Worcester*, 6

<sup>1</sup> *State v. Briggs*, 9 R. I. 361; *Commonwealth v. Patterson*,



**127.** In order to entitle a witness to refuse to answer a question, on the ground that it might tend to criminate him, the question need not be such that the answer thereto would, itself, be evidence against him on a criminal charge; it is sufficient if the answer might furnish a link in a chain of evidence, which might implicate him in such a charge. (*k*) In one case, indeed, (*l*) *Pollock, C. B.*, went further; laying it down, incidentally,—for it was unnecessary to the decision of the point before the court,—that it did not at all follow, that the witness who is privileged from answering must be guilty of an offense; that a man may be placed in such circumstances connected

*M. & S. 194, 200, per Bayley, J.; Cartwright v. Green, 8 Ves. 405, 410.*

(*k*) *Per Blackburn, J., Reg. v. Hulme, L. Rep., 5 Q. B. 377, 384.*  
*And see Fisher v. Ronalds, 12 C. B. 765, per Maule, J.; Osborn v. The London Dock Company, 10 Exch.*

*701, per Alderson, B.; The People v. Mather, 4 Wend. 253; Paxton v. Douglas, 19 Ves. 226, 227; Short v. Mercier, 3 Mac. & G. 218; Mitford's Pl. 359, 5th ed.*

(*l*) *Adams v. Lloyd, 4 Jurist, N. S. 593; S. C. 3 H. & N. 363.*

8 *Phil. (Pa.) 609; Same v. Paynter, Id. 610; Same v. Reed, Id. 385; Ware v. State, 35 N. J. L. 553; Taulman v. State, 37 Ind. 353.* In civil actions, see *Davis v. Plymouth, 45 Vt. 492; Craig v. Brendel, 69 Pa. St. 153; Bennefield v. Hypres, 38 Ind. 498; Pea v. Pea, 35 Id. 387; Barker v. McAuley, 4 Heisk. 424; Dellinger's Appeal, 71 Pa. St. 425; Robinson v. Chadwick, 22 Ohio St. 527; Hicks v. Bradner, 2 Abb. (N. Y.) App. Dec. 362; Southwick v. Southwick, 49 N. Y. 510; Buck v. Ashbrook, 51 Mo. 539; Sprading v. Conway, Id. 51; Ruth v. Ford, 9 Kan. 17; Call v. Byram, 37 Ind. 499; Stanley v. Stanley, 36 Id. 445; Seabrook v. Brady, 47 Ga. 650; O'Connor v. Hartford Fire Ins. Co., 81 Wis. 161.*

In matters between husband and wife, see *Anderson v. Anderson, 9 Kan. 112; Barringer v. Barringer, 69 N. C. 179.* A husband is a competent witness to prove his wife's impotency (*Id.*); but not to prove her adultery (*Cook v. Cook, 46 Ga. 308*). In divorce cases, in Pennsylvania, a husband or wife may testify in his or her favor, but cannot be compelled to testify against themselves; and see the arguments of counsel and opinion of Neilson, J., in the *Tilton-Beecher Case*, as to the admissibility of testimony of plaintiff's wife on the part of the defendant.

with the commission of a crime, that if he disclose them he would be fixed on by his hearers as the guilty person, and he might not be able to explain those circumstances, so that the rule is not always the shield of guilt—it may be the protection to innocence. In the absence of more distinct authority, it is not easy to say whether this notion is well founded. Possibly such cases may fall within one or both of the principles, “*Nemo tenetur seipsum accusare*,” (*m*) “*Nemo tenetur se infortuniis et periculis exponere* ;” (*n*)<sup>1</sup> in furtherance of the latter of which principles, a party under the necessity of making continual claim to lands, was not bound to approach them more closely than was consistent with his personal safety. (*o*)

128. When the grounds of privilege are before the court, it is for the court, and not for the witness or party interrogated, to decide as to their sufficiency. (*p*) But much difference of opinion has been expressed of late years, as to whether, if a witness or party interrogated objects to answering a particular question, alleging on oath that the answer would tend to expose him to criminal proceedings, penalty, or forfeiture, the court is bound to disallow the question, even though it does not see in what possible way the answer to it could have that effect. This question arose in *R. v. Garbett*, (*q*) on a case reserved, which was, however, ultimately decided on another point. In *Fisher v. Ronalds*, (*r*) *Jervis, C. J., and Maule, J.*, laid down in the most unequivocal terms, that the

(*m*) *Supra*, § 126.

(*n*) *Co. Litt.* 253 b.\*

(*o*) *Litt. sect.* 419 et seq.

(*p*) *In re The Mexican & South American Company*, *Ex parte Aston*, 27 *Beav.* 474; affirmed on appeal, 4 *De*

*Gex & J.* 320; *Ex parte Fernandez*, 10 *C. B.*, *N. S.* 3, 40, per *Willes, J.*

(*q*) 1 *Den. C. C.* 236; 2 *Car. & K.* 474.

(*r*) 12 *C. B.* 762; 22 *L. J.*, *N. S.*, *C. P.* 62; 17 *Jurist*, 393.

<sup>1</sup> See *ante*, note 1, p. 175.

court is bound by the statement on oath of the witness; and their language was cited with approbation in *Adams v. Lloyd* (*s*) by Pollock, C. B., but with this qualification, that the judge must be perfectly certain that the witness is not trifling with the authority of the court, and availing himself of the rule of law, in order to keep back the truth, having in reality no ground whatever for claiming the privilege. The whole doctrine was, however, distinctly denied by Parke, B., in *Osborn v. The London Dock Company*, (*t*), and by Stuart, V. C., in *Sidebottom v. Adkins*, (*u*) the latter of which is an express decision on the subject, the others being only dicta unnecessary for the determination of the cases in which they are found. It was also gravely doubted by Willes, J., in *Ex parte Fernandez*. (*v*) In support of the exclusive right of the witness or party interrogated, it was urged that, as he alone can know in what way the answer to any particular question could affect him, the requiring him to explain this to the court would be a virtual denial of the privilege; seeing that it is impossible to affirm, *à priori*, that any imaginable fact can under no possible circumstances whatever become evidentiary, either immediately or mediately, of any other. That as, when a witness called on to produce documents under a subpoena *duces tecum*, swears that they are his muniments of title, the court always excuses him from producing them, (*w*) a similar rule ought to prevail when, under an ordinary subpoena, a witness is asked questions, the answers to which may be equally or even more injurious to him. On the other hand, however, it is to be remembered that the judge

(*s*) 3 H. & N. 361, 362; 27 L. J., N. S., Exch. 499; 4 Jur., N. S. 590.

(*t*) 10 Exch. 701; 1 Jur., N. S. 93.

(*u*) 3 Jur., N. S. 631, 632.

(*v*) 10 C. B., N. S. 3, 39.

(*w*) Tayl. Ev. §§ 428, 131b, 4th ed.

is the proper authority to determine all questions relative to the reception of testimony; and consequently to decide whether, taking into consideration all the circumstances, including the demeanor of the person who claims the privilege, an answer to any particular question ought to be exacted; (*x*) and that, to allow the witness or party interrogated the exclusive right contended for, would not only introduce an anomaly into the law of evidence, but enable every witness, who might be swayed by improper motives, and be indifferent to his reputation, easily, and with perfect impunity, to evade giving any evidence whatever. The position that a witness, or party interrogated, ought not to be compelled to show in what precise way a question might injure him, however sound in itself, falls far short of establishing that he is the exclusive judge, not only as to the existence of the facts which might expose him to injury, but also as to the effect of those facts in point of law. Besides, it is a mistake to suppose that every unfounded objection raised by a witness to a question, must necessarily have its foundation in *mala fides*; it may be the result of idle terror or scruples, to give effect to which would be a violation of the well-known principle of law, that the fear which excuses an act must not be a vain fear, but a reasonable one, "*Qui cadere potest in virum constantem.*" (*y*) The rule that a witness will not be compelled to produce documents, which he swears are his muniments of title, is in a great degree the offspring of necessity; being based on the immediate and irreparable mischief which would ensue, from an erroneous decision of the judge as to the nature of the documents. Still we apprehend, that if

(*x*) *The People v. Mather*, 4 Wend. 229, 254.

(*y*) *Co. Litt.* 253 b; *Lofft's Max.* 440. See also *Dig. lib.* 50, tit. 17, l. 184.

it could be clearly shown that the statement of the witness as to their character was untrue, the judge would compel their production.

128.\* The whole question came at last before the Queen's Bench in *Reg. v. Boyes*, (z) where the dicta in *Fisher v. Ronalds* were distinctly overruled by an unanimous decision of that court. That was an information filed by the attorney-general, in pursuance of a resolution of the house of commons, for bribery at an election for members to serve in parliament; and at the trial, Martin, B., held that a witness who had been pardoned for his share in the transaction, was bound to answer questions concerning it. On this ruling being questioned before the court in banc, consisting of Cockburn, C. J., Wightman, Crompton, and Blackburn, JJ., it was argued that the witness was in jeopardy by being compelled to answer; for although the crown could pardon offenses as regards itself, the witness was still liable to an impeachment by the house of commons, against which, by 12 & 13 Will. 3, c. 2, s. 3, no pardon of the crown could be pleaded. The case was argued, and *Fisher v. Ronalds* and some other authorities were referred to. After time taken to consider, the following judgment was delivered by Cockburn, C. J., in the name of himself and the other members of the court: "It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law: and that the statement of his belief to that effect, if not manifestly made *malâ fide*, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are

(z) 1 B. & S. 311.

clearly of opinion that the view of the law propounded by Lord Wensleydale, in *Osborn v. the London Dock Company*, (a) and acted upon by vice-chancellor Stuart, in *Sidebottom v. Adkins*, (b) is the correct one ; and that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question : there being no doubt, as observed by Alderson, B., in *Osborn v. The London Dock Company*, that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril. Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the

(a) 10 Exch. 698, 701.

(b) 3 Jur., N. S. 631.

law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse, if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the house of commons. No instance of such a proceeding in the, unhappily too numerous, cases of bribery which have engaged the attention of the house of commons has ever occurred, or, so far as we are aware, has ever been thought of. To suppose that such a proceeding would be applied in the case of this witness would be simply ridiculous; more especially as the proceeding by information was undertaken by the attorney-general by the direction of the house itself, and it would therefore be contrary to all justice to treat the pardon provided, in the interest of the prosecution, to ensure the evidence of the witness, as a nullity, and to subject him to a proceeding by impeachment. It appears to us, therefore, that the witness in this case was not, in a rational point of view, in any, the slightest, real danger from the evidence he was called upon to give, when protected by the pardon from all ordinary legal proceedings; and that it was therefore the duty of the presiding judge to compel him to answer."

129. It used to be considered, that the witness who intended to claim the privilege of not answering questions of this nature, was bound to claim his privilege at once; and that, if he began a criminative statement when he might have refused to make it, he

was compellable to go on with it,—a rule probably established, with the view of preventing witnesses from converting the privilege given by law for their own protection, into a means of serving one of the litigant parties, by setting up the privilege when their evidence began to tell against him. But in *R. v. Garbett* (*d*) a majority of the judges overruled the old notion, and held that the witness might claim his protection at any stage of the inquiry.

**130.** Whether a witness is compellable to answer questions having a tendency to disgrace him; as, for instance, whether he was ever convicted of an offense, or had suffered some infamous punishment, or been in jail on a criminal charge, is a great question in our books, and one on which any attempt to reconcile the authorities would be perfectly hopeless. It is indeed settled that he must answer if the question is relevant to the issue in the cause; (*e*) the doubt is, when it relates to collateral matters, and is only put in order to test his credit. The arguments pro and con. are thus stated in a work of authority (*f*) “There seems to be no reported case, in which this point has been solemnly determined; and, in the absence of all express authority, opinions have been much divided. The advocates for a compulsory power in cross-examination might argue, that as parties are frequently surprised by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary: and that if a witness may not be

(*d*) 1 Den. C. C. 236; 2 Car. & K. 495. & Am. Ev. 916, 917.

(*e*) 2 Phill. Ev. 494, 10th ed.; Ph. (f) 2 Phill. Ev. 494 10th ed.



questioned as to his character at the moment of trial, the property and even the life of a party must often be endangered.—Those, on the other side, who maintain that a witness is not compellable to answer such questions, may contend to the following effect. They say the obligation to give evidence arises from the oath which every witness takes; that by this oath he binds himself only to speak touching the matters in issue; and that such particular facts as these—whether the witness has been in jail for felony or suffered some infamous punishment, or the like—cannot form any part of the issue, as appears evident from this consideration, that the party against whom the witness is called, would not be allowed to prove such particular facts by other witnesses. They may argue, further, that it would be an extreme grievance to a witness, to be compelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character afresh to evil report and obloquy, when perhaps by subsequent conduct he may have recovered the good opinion of the world; that if a witness is privileged from answering a question, though relevant to the matters in issue, because it may tend to subject him to a forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question, to the disparagement and forfeiture of his character; that in the case of accomplices, in which this compulsory power of cross-examination is thought to be more particularly necessary, the power may be properly conceded to a certain extent, because accomplices stand in a peculiar situation, being admitted to give evidence only under the implied condition of making a full and true confession of the whole truth; but even accomplices are not to be questioned, in their cross-examination, as to

other offenses in which they have not been concerned with the prisoner; lastly, that with respect to witnesses, in general, the best course to be adopted, both in point of convenience and justice, is to allow the question to be asked, at the same time allowing the witness to shelter himself under his privilege of refusing to answer, and, if he refuses, to leave it to the jury to draw their own conclusion as to his motives for such refusal. Although there appears not to be any express decision on the point, whether a witness is compellable to answer questions degrading to his character, yet several opinions have been pronounced by judges of great authority, from which it may be collected that the witness is not compellable to answer such questions." In support of this view the following authorities are then cited: Cook's case, (*g*) Sir J. Friend's case, (*h*) Layer's case, (*i*) *R. v. Lewis*, (*k*) *MacBride v. MacBride*, (*l*) and *R. v. O'Coigly*, *O'Conner*, and others. (*m*) The first three of these cases—the latest of which was decided in 1722—are taken from the State Trials; and the second is only a dictum; for the point was whether a witness was bound to say was he a Roman Catholic, his answering which in the affirmative would, in those days, have exposed him to a penalty. (*n*) The fourth and fifth prove too much, for in them the judges ruled that questions such as we are now considering could not be put,—a position clearly erroneous. (*o*) And in the sixth, it is not easy to collect on what precise ground the decision of the court

(*g*) 13 Ho. St. Tr. 334.

(*h*) Id. 16, 17.

(*i*) 16 Id. 161.

(*k*) 4 Esp. 225.

(*l*) Id. 242.

(*m*) 26 Ho. St. Tr. 1353.

(*n*) See *R. v. Lord George Gordon*, 2 Dougl. 593.

(*o*) Ph. & Am. Ev. 920 et seq.; 2 Phill. Ev. 497 et seq., 10th ed.; Stark Ev. 213, 4th ed.; Ros. Crim. Ev. 166, 4th ed.

proceeded, as they do not assign any reasons for it. To these are commonly added *Dodd v. Norris*, (*p*) *R. v. Hodgson*, (*q*) and *Millman v. Tucker*; (*r*) but in the first two the question involved a charge of fornication, the answer to which might have rendered the party liable to be proceeded against in the Ecclesiastical Court. The same view is also supported by the old cases in the State Trials, of *Reading* (*s*) and the *Earl of Shaftesbury*. (*t*) On the other hand, however, there are several modern authorities expressly in point the other way; viz., *R. v. Edwards*, (*u*) *Frost v. Holloway*, (*x*) and *Cundell v. Pratt*, (*y*) to which may be added *Roberts v. Allatt*; (*z*) and these are supported by other cases. (*a*) It seems, indeed, that, in strictness, the court can compel a witness to answer under such circumstances, although in the exercise of its discretion it will not do so, unless the ends of justice clearly require it. But this seldom happens; as the object of the cross-examining party, is, in general, sufficiently attained by putting the question; for the silence of a person, to whom in his hearing a crime or disgraceful act is imputed, is in many instances tantamount to confession. "No doubt," says a modern work on Evidence, (*b*) "cases may arise where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be

(*p*) 3 Camp. 519.

(*q*) R. & R. C. C. 211

(*r*) Peake's Ad. Ca. 222.

(*s*) 7 Ho. St. Tr. 296.

(*t*) 8 Id. 817.

(*u*) 4 T. R. 440.

(*x*) Ph. & Am. Ev. 922, note; 2  
Phill. Ev. 500, 10th ed.

(*y*) 1 M. & M. 108.

(*z*) Id. 192.

(*a*) See Ph. & Am. Ev. 923; 2 1 h.  
Ev. 501, 10th ed.

(*b*) Tayl. Ev. §§ 1314, 1315, 5th ed

rightly suppressed ; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But the rule of protection should not be further extended : for, if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation ; but, on the other hand, it is obviously most important, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause."

It must be borne in mind, however, that where a witness is asked a question which tends to disgrace him, and answers the question, the cross-examiner is in general bound by the answer so given, because the question goes only to the credit of the witness, which is a collateral matter, and, to admit evidence to contradict him, would be to raise a question not relevant to the issue. (c)

(c) See *R. v. Holmes*, L. Rep., 1 C. v. Clarke, 2 Stark. 241 ; overruling *R. v. Hodgson*, R. & R. 211 ; *R. v. Cockcroft*, 11 Cox, C. C. 410 ; *R. v. Robins*, 2 Moo. & R. 512.

But by the 17 & 18 Vict. c. 125, sects. 25 and 103, a witness in a civil case may be asked whether he has been convicted of any felony or misdemeanor; and if he either denies the fact or refuses to answer, the opposite party may prove the conviction. And, by 28 Vict. c. 18, s. 6,—which applies “to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence,” (*d*)—a witness may be asked whether he has been convicted of any felony or misdemeanor; and if he either denies, or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction.

**131.** It was formerly a disputed point, whether witnesses were compellable to answer questions, the answers to which would subject them to civil proceedings. (*e*) To set this matter at rest, the 46 Geo. 3, c. 37, was passed, which, after reciting the existing doubts on the subject, proceeded to declare and enact, that “a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, (*f*) by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit.”<sup>1</sup>

(*d*) Sect. 1.

(*e*) 2 Phill. Ev. 492, 493, 10th ed.; Stark. Ev. 203, 204, 4th ed.

(*f*) As to the nature and extent of

the forfeiture spoken of, see *Pye v. Butterfield*, 5 B. & S. 829, and the cases there referred to.

<sup>1</sup> The refusal of a party to a suit, when testifying as a witness, to answer a material question, on the ground that it might criminate himself, as on an issue between a seller and purchaser of liquors,—the refusal of the seller to state whether he had a license,—is competent evidence against him. *Andrews v. Frye*, 104 Mass. 234.

## CHAPTER II.

## INCOMPETENCY OF WITNESSES.

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**132.** As the reception of, and credit attached to the statements of witnesses by courts of justice, rest on the natural, if not instinctive, belief which is found to exist in the human mind, (*a*) in the general veracity of human testimony, especially when guarded by the sanction of an oath, it follows that all testimony delivered under that sanction, and perhaps even without it, ought to be heard and believed, unless special reason appears for doubt or disbelief. And here arises a leading distinction, which runs through the judicial evidence of this and most other countries; namely, that in some instances the special reason is so obvious, that the law deems it safer to reject the testimony of

(*a*) Introd. pt. I, § 15.

the witness altogether ; while in others it allows the witness to make his statement, leaving its truth to be estimated by the tribunal. (*b*) This is the distinction taken in our books between the competency and the credibility of witnesses. A witness is said to be incompetent to give evidence, when the judge is bound as matter of law to reject his testimony, either generally or on some particular subject ; in all other cases it is to be received, and its credibility weighed by the jury. The present chapter will be confined to the incompetency of witnesses.

**133.** Incompetency in a witness will not be presumed. It comes in the shape of an exception or objection to the witness ; and if the facts on which it rests are disputed they must, like all other collateral questions of fact, (*c*) be determined by the judge ; (*d*) who, in cases of doubt, is always disposed to receive the witness, and let the objection go to his credibility rather than to his competency. In many cases the ground of incompetency is apparent to the senses of the judge ; as where a witness presents himself in a state of intoxication, (*e*) or is an obvious lunatic, (*f*) or is of such tender years that the judge deems a preliminary inquiry into his religious knowledge essential, (*g*) and the like. But the ordinary mode of ascertaining whether a witness is competent, is by examining him on what is called the voir dire,-

(*b*) "Summa distinctio et observatio est, testes aut prohiberi penitus, aut reprobari duntaxat. Prohibentur, qui planè non audiuntur ; Reprobantur, quibus auditis aliquid objici potest, quo minus fidem mereantur." Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 1. See 1 Hale, P. C. 535 ; 2 Id. 276-7.

(*c*) Bk. I, pt. I, § 82.

(*d*) Bartlett v. Smith, 11 M. & W. 483 ; R. v. Hill, 2 Den. C. C. 254.

(*e*) See the judgment in Matusell v. Reg., 1 Dears. & B. 405. "Ebrietas probatur ex aspectu illius qui asseritur ebrius, &c." Masc. de Prob. Concl. 579, nn. 5 et seq.

(*f*) *Infra*.

(*g*) *Infra*.



*i. e.* a sort of preliminary examination by the judge, in which the witness is required to speak the truth with respect to the questions put to him; when, if incompetency appears from his answers, he is rejected, (*h*) and even if they are satisfactory, the judge may receive evidence to contradict them, or establish other facts showing the witness to be incompetent. (*i*) It sometimes happens that the incompetency of a witness is not discovered until after he has been sworn, and his examination proceeded with a considerable way, or perhaps even brought to a close; under which circumstances the judge ought, it seems, to erase that witness's evidence from his notes, and tell the jury to pay no attention to it. (*k*) It has been said, also, that although in regular order the examination on the *voir dire* precedes the examination-in-chief, yet when a ground of incompetency is thus unexpectedly discovered, the judge may stop the proceedings and examine on the *voir dire* with the view of ascertaining the fact. (*l*)

134. The only grounds on which the evidence of a witness can with any appearance of reason be rejected, unheard, are reducible to four. 1. That he has not that degree of intellect which would enable him to give a rational account of the matters in question. 2. That he cannot or will not guarantee the truth of his statements by the sanction of an oath, or what the law deems its equivalent. 3. That he has been guilty of some crime or misconduct, showing him to be a person on whose veracity reliance would most prob-

(*h*) *Yardley v. Arnold*, 10 M. & W. 141; *Jacobs v. Layborn*, 11 M. & W. 685; *Doe d. Norton v. Webster*, 12 A. & E. 442.

(*i*) *Bartlett v. Smith*, 11 M. & W. 483; *Cleave v. Jones*, 7 Exch. 421.

(*k*) See *Jacobs v. Layborn*, 11 M. &

W. 685; and the authorities there cited; *R. v. Whitehead*, L. R., 1 C. C. 35; 1 Cox, C. C. 234.

(*l*) Per Rolfe, B., in *Jacobs v. Layborn*, *ut supra*. See also the resolution of the judges in the *Queen's Case*, 2 B. & B. 284.

ably be misplaced. 4. That he has a personal interest in the success or defeat of one of the litigant parties. In a word, his rejection should be based on the reasonable apprehension arising from known circumstances, that his evidence may mislead the tribunal and so cause misdecision. But various classes of persons were rejected by the civilians, and our old lawyers, on a very different ground, viz., that the giving evidence in a court of justice is a right or privilege rather than a duty; and consequently that incompetency to give evidence is a fitting punishment for matters to which the law is desirous of attaching a stigma. And although this is a fallacious and shortsighted view, even when the offense stigmatized is a grave violation of natural or municipal law, the ancient practice went much further, and affixed the brand of incompetency on erroneous or obnoxious opinions; thus not only punishing the delinquent, but often inflicting ruin on the plaintiff, defendant, prosecutor, or accused person, whose life, property, or honor might have been saved by the evidence of the rejected witness, whose doctrines he might nevertheless have held in due abhorrence. There can be no doubt that this mischievous principle was borrowed from the civil law, or, to speak more correctly, from those forms of it which prevailed in the lower empire and the middle ages. (*m*) Most of the provisions on the immediate subject are to be found in Cod. lib. 1, tit. 5; according to the 21st constitution of which, bearing date A. D. 532, heretics and Jews were not in general allowed to bear testimony against orthodox Christians. Where heretics or Jews were parties, the evidence of heretics and Jews was receivable, the emperor observing, "*concedimus dignos litigatoribus*

(*m*) See Bonnier, *Traité des Preuves*, §§ 185 et seq.

*etiam testes introducere;*" as it also was in certain other cases from necessity, "*ne probationum facultas angustetur:*" but the testimony of pagans, Manichæans, and some other sects, was rejected under all circumstances. (*n*) Very similar rules were acted on by the canonists. (*o*) In former times in this country, when ecclesiastical dogmas were enforced by the secular arm, and the writ *de hæretico comburendo* was in force, the open profession of infidelity was rare; and Jews had been expelled from the kingdom in the reign of Edw. I., so that very explicit information on this subject cannot be expected from our early lawyers. Sir Edward Coke, indeed, in his First Institute, lays down broadly that an infidel cannot be a witness, (*p*) but cites no authority. In Calvin's case also (*q*) he says, "All infidels are in law perpetui inimici, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility), for between them, as with devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace." For this the only authorities cited, besides one of those passages of Scripture which are commonly strained for similar purposes, are the 12 Hen. VIII. fol. 4a, pl. 3, and the Regist. Brev. Orig. 282, b; the former of which is a mere dictum by Brook, J., that a pagan cannot maintain an action; and the latter is an extract from a writ relative to the Knights Hospitallers, in which their institution is described as founded "*in tuitionem et defensionem universalis et sacrosanctæ ecclesiæ, contra Christi et Christianorum inimicos.*"

(*n*) See this constitution at length, Angl. 448; Devot. Inst. Canon. lib. 3, Introd. pt. 2, § 63, u. (b). tit. 9, § 13.

(*o*) Lancel. Inst. Jur. Can. lib. 3, (*p*) Co. Litt. 6 b.  
tit. 14, § 19; Ayl. Par. Jur. Can. (*q*) 7 Co. 17.

In another of his works also, (*r*) he tells us that the passage in Bracton, where it is stated that an alien born cannot be a witness must be intended of an alien infidel. Whether Coke did not overstate the bigotry even of his own time may be questioned, but certain it is that within half a century after his death very different notions had arisen; and the whole subject will be best understood from the following powerful exposé of the fallacy of his views by L. C. J. Willes, in his judgment in *Omichund v. Barker*. (*s*) “As to the general question, Lord Coke has resolved it in the negative, Co. Litt. 6 b, that an infidel cannot be a witness; and it is plain by this word ‘infidel’ he meant Jews as well as heathens, that is, all who did not believe the Christian religion. In 2 Inst. 507, and many other places, he calls the Jews infidel Jews; and in the 4 Inst. 155, and in several other passages of his books, he makes use of this expression, infidel pagans, which plainly shows that he comprised both Jews and heathens under the word infidels; and, therefore, Sergeant Hawkins (though a very learned, painstaking man) is plainly mistaken in his History of the Pleas of the Crown, vol. 2, p. 434, where he understands Lord Coke as not excluding the Jews from being witnesses, but only heathens. But Lord Chief Justice Hale understood this in another sense, in that remarkable passage of his which I shall mention more particularly by and by. I shall, therefore, take it for granted that Lord Coke made use of the word ‘infidels’ here in the general sense; and that will, I think, greatly lessen the authority of what he says; because long before his time, and of late, almost ever since the Jews have returned into England, they have been admitted to be sworn as witnesses. But, I

(*r*) 4 Inst. 279.

(*s*) Willes, 541.

think, the counsel for the defendant seemed to mistake the reason upon which Lord Coke went. For he certainly did not go upon this reason, that an infidel could not take a Christian oath, and that the form of the oath cannot be altered but by act of parliament; but upon this reason, though I think a much worse, that an infidel was not *fide dignus*, nor worthy of credit; for he puts them in company and upon the level with stigmatized and infamous persons. And that this was his meaning appears more plainly by what he says in Calvin's case. (The Lord Chief Justice here cites the passage already quoted.) (*t*) But this notion, though advanced by so great a man, is, I think, contrary not only to the Scripture but to common sense and common humanity. And I think that even the devils themselves, whose subjects he says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion, and would at once destroy all that trade and commerce from which this nation reaps such great benefits. . . . I have dwelt the longer upon this saying of his, because I think it is the only authority that can be met with to support this general assertion, that an infidel cannot be a witness. For though it may be founded upon some general sayings in Bracton, Fleta, and Britton, and other old books, those I think of very little weight, and therefore shall not repeat them; first, because they are only general dicta; and in the next place, because these great authors lived in very bigoted popish times, when we carried on very little trade except the trade of religion, and consequently our notions were very narrow, and such as I hope will never prevail again in this country. As to what is said by that great man, the Lord Chief

(*t*) *Supra*, 193.

Justice Fortescue, in his book *De Laudibus*, cap. 26, that witnesses are to be sworn on the holy evangelists, he is speaking only of the oath of a Christian, and plainly had not the present question at all in his contemplation. To this assertion of my Lord Coke's (besides what I have already said), I will oppose the practice of this kingdom before the Jews were expelled out of it by the stat. 18 Edw. I. For it is plain both from Madox's *History of the Exchequer*, pp. 167 and 174, and from Selden, vol. ii. p. 1469, (*u*) that the Jews here, in the time of King John and Henry III. were both admitted to be witnesses, and likewise to be upon juries in causes between Christians and Jews, and that they were sworn upon their own books, or their own roll, which is the same thing. (*v*) I will likewise oppose the constant practice here, almost ever since the Jews have been permitted to come back again into England, viz.: from the 19 Car. II. (when the cause was tried which is reported, 2 Keb. 314), down to the present times, during which I believe not one instance can be cited, in which a Jew was refused to be a witness and to be sworn on the Pentateuch. To this assertion I shall likewise oppose the very great authority of Lord Hale, vol. 2, p. 279. . . . 'It is said by my Lord Coke that an infidel is not to be admitted as a witness, the consequence whereof would also be, that a Jew (who only owns the Old Testament) could not be a witness. But I take it, that although the regular oath, as it is allowed by the laws of England, is *tactis sacrosanctis Dei evangeliiis*, which supposeth a man to be a Christian, yet, in cases of necessity, as in foreign contracts between merchant and

(*u*) Selden's Works by Wilkins, in six vols., A. D. 1726.

(*v*) See, in further illustration of this, the case of *Cok. Hagin*, Memo-

randia in Scacc. M. 3 Edw. I., and that in the 9th Edw. I., as cited- *Dyer*, 144 a, pl. 59, in marg.

merchant, which are many times transacted by Jewish brokers, the testimony of a Jew, *tacto libro legis Mosaicæ*, is not to be rejected, and is used, as I have been informed, among all nations. Yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, especially *si juraverint per verum Deum creatorem*; and special laws are instituted in Spain touching the form of the oaths of infidels. Vide Covarruviam, tom. 1, part 1, *de formâ juramenti*.' And he mentions a case, where it would be very hard if such an oath should not be taken by a Turk or Jew, (x) which he holds binding; for possibly he might think himself under no obligation if he were sworn according to the usual style of the courts of England. 'But then it must be agreed, that the credit of such testimony must be left to the jury.'

. . . The last answer that I shall give to this assertion of Lord Coke's, as explained in Calvin's case, are his own words in his 4 Inst. 155. '*Fœdus pacis or commercii*' (saith he), 'though not *mutui auxilii*, may be stricken between a Christian prince and an infidel pagan; and as these leagues are to be established by oath, a question will arise, whether the infidel or pagan prince may swear in this case by false gods, since he thereby offendeth the true God by giving worship to false gods. This doubt' (saith he), 'was moved by Publicola to Saint Augustine, who thus resolveth the same: He that taketh the credit of him that sweareth by false gods, not to any evil but good, he doth not join himself to that sin of swearing by devils, but is partaker with those lawful leagues wherein the other keepeth his faith and oath; but if a

(x) *I. e.*, if a murder committed in England, in presence only of a Turk or a Jew, should be punishable, because he could not take an oath which would be binding on his conscience.

Christian should anyways induce another to swear by them, he would grievously sin. But, seeing that such deeds are warranted by the word of God, all incidents thereto are permitted.' This is (I think) as inconsistent as possible with his notion, that an infidel is not fide dignus, and a full answer to what he said in Calvin's case on this head; and therefore I shall leave him here, having (as I think) quite destroyed the authority of his general rule, that none but a Christian ought to be admitted as a witness."<sup>1</sup>

135. But although these rational and enlightened views had gained considerable ground during the seventeenth and the early part of the eighteenth centuries, (y) they cannot be said to have been

(y) In the case of *Fachina v. Sabine*, at the Council, 2 Str. 1104, Dec. 1731, a Moor was sworn on the Koran; and so far back as Mich. 1657, a witness who objected to lay his

hand on the book and kiss it, was allowed to swear, it being laid open before him and he holding up his right hand. *Colt v. Dutton*, 2 Sid. 6.

'The question of intelligence, or of religious conviction, and of the enormity and moral consequences of lying and false swearing, it is apprehended, is the one now governing. So, where a court examines an illiterate child, to test its competency as a witness, and asks her "what would become of her if she told a lie," and the child answers, "I shall go to the bad world,"—it was held, that she was competent to testify (*Vincent v. State*, 3 Heisk. 120). And so it was held in another case, when the child's answer was, "the bad man will get me" (*Logston v. State*, Id. 414). And so in *Commonwealth v. Cary*, 2 Brews. (Pa.) 404, a child of eight was allowed to be instructed by the crier and sworn, who said she could not read, and had never heard of the Bible, but said that she must tell the truth, or she would go to "the big fires of hell." This moral conviction of course must be accompanied by mental capacity (See *McCutcheon v. Pique*, 4 Heisk. 565; *Commonwealth v. Winnemore*, 2 Brews. (Pa.) 378). The incompetency of a witness, on the ground of disbelief in a God, may be proved by his declarations to others on the subject. *Anderson v. Maberry*, 2 Heisk. 653; and see, as to law of Massachusetts, *Commonwealth v. Burke*, 82 Mass. (16 Gray) 33. In Georgia, *Donkle v. Kohn*, 44 Ga. 266.



established until the great case of *Omychund* (or *Omichund*) *v.* *Barker*, (2) in 1744-5, when the whole matter was fairly brought before a high tribunal, whose deliberate decision 'forms the basis of our law on this subject. In that case, a commission to examine witnesses in the East Indies having been issued by the Court of Chancery, the commissioners certified that they had examined several persons professing the Gentoo religion, whose evidence was delivered on oath, taken in the usual and most solemn form in which oaths were most usually administered to witnesses who profess that religion, and in the same manner in which oaths were usually administered to such witnesses, in the courts of justice erected by letters patent at Calcutta. On account of its importance, Lord Chancellor Hardwicke was assisted at the hearing of the cause by Lee, C. J., Willes C. J., and Parker, C. B.; when, on its being proposed to read as evidence the deposition of one of those persons, the defendants' counsel objected that, in order to render a person a competent witness, he must be sworn in the usual way upon the evangelists, and that the law of England recognized no other form of oath. The case having been learnedly argued on both sides, and the authorities fully gone into, each of the judges delivered an able and elaborate judgment; in which they showed clearly that oaths are not peculiar to the Christian religion, having been in constant use, not only in the ancient world, but among men in every age; that the substance of an oath is essentially the same in all cases; namely, an invocation of a Superior Power to attest the veracity of a statement made by a party, acknowledging his readiness to avenge

(2) 1 Atk. 21. There is a very short judgment of Willes, C. J., is given a note of it in 1 Wils. 84; and the length in his Reports, p. 538.

falsehood, and in some cases invoking that vengeance ; consequently, that the mode of swearing is not the material part of the oath, and ought to be adjusted to suit the conscience of the witness. They, however, agreed that infidels who do not believe in a God or a state of rewards and punishments cannot be admitted as witnesses ; and although from some of the language in that case and in other books, it might be supposed that a belief on the part of the witness in a future state of reward and punishment is required, the better opinion is, that belief in an avenger of falsehood generally, is the only thing needful, the time and place of punishment being mere matter of circumstance. (*a*)

136. The principles laid down in *Omychund v. Barker* have not only been fully adopted into our law and practice, (*b*) but are recognized by the stat. 1 & 2 Vict. c. 105 ; which enacts, that “in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such persons may declare to be binding ; and every such person, in case of willful false swearing, may be convicted of the crime of perjury, in

(*a*) Tayl. Evid. § 1252, 4th ed. ; Rosc. Cr. Evid. 121, 122, 5th ed. ; 1 Greenl. Ev. § 328, 7th ed. For the discrepancy in the American authorities on this subject, see Appleton on Evidence, 22, 23, 269, 270 ; and Taylor in loc. cit. note (1). See further, on the subject of oaths, Introd. §§ 56 et seq.

(*b*) *Maden v. Catanach*, 7 H. & N. 360 ; *Peake's Ev.* 141, 5th ed. ; *Ph. & Am. Ev.* 8 et seq. ; 1 Greenl. Ev. § 328, 7th ed. ; *Judgments of the Barons of the Exchequer* in *Miller v. Salomons*, 7 Exch. 475 ; *affir. on error*, 8 Exch. 778.

the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

137 Our common-law rules as to incompetency seem to have been copied from the civil law, which, however, carried the principle of exclusion much further: and, indeed, our ancestors probably saw, what is obvious enough in itself, that although an extended prohibition of suspected evidence may be valuable under a system where all questions of law and fact are decided by a single judge, it is misplaced in a country where the tribunal has the aid of a jury, acting either as judges of fact, as at the present day, or as witnesses, as in former times. (*c*) So soon, therefore, as the modern law of evidence began to assume its present form—*i. e.* in the latter half of the seventeenth and beginning of the eighteenth centuries—the attention of our judges and lawyers naturally became much turned to this question: when the advancing opinions of the age, the then fully recognized principle that the jury are not witnesses, but are judges of the facts in dispute, (*d*) and the hopelessness of attempting to reconcile the chaos of decisions as to the incompetency of witnesses, which were to be found in the old books, showed the imperative necessity of recasting the system. We have already seen how the law respecting oaths was settled by the case of *Omychund v. Barker*, in 1745; (*e*) and with respect to another very important branch of the subject—the incompetency of witnesses on the ground of interest—the court of Queen's Bench in Lord Kenyon's time laid down as a clear and certain rule for the future, that, in order to render a witness incompetent on that ground, it must

(*c*) See bk. 1, pt. 2, § 119.

(*e*) *Supra*, § 135.

(*d*) *Id.*

appear either that he was directly interested in the event of the suit, or that he could avail himself of the verdict in the cause, so as to give it in evidence on some future occasion in support of his own claim. (*f*)

138. This rule having become pure matter of legal history, it would be useless to refer to the numerous cases illustrative of its extent and meaning, which are reported in the books. It will be sufficient to state a few general principles. First, the rule drew a distinction between an interest in the question, and an interest in the event of the suit. However strong a witness's bias on the subject of the suit, or his hopes of obtaining some benefit from the result of the trial might be, these formed no objection to his competency, unless he had a direct interest in its event. Thus, if two actions were brought against two persons for the same assault, in the action against one, the other was a competent witness, because he was not interested in the event. So, for the same reason, where an action was brought against an underwriter on a policy of insurance, another underwriter on the same policy was held a competent witness for the defendant. (*g*) Again, the interest, to disqualify, must have been a certain interest, and a legal existing interest. If it existed merely in the imagination, or belief, or expectation of the witness, he was not incompetent, however strongly the objection might be urged against his credibility. (*h*) But, no matter how small and inconsiderable the amount of the legal interest might be, the witness was incompetent. (*i*) Where, however, a witness was incompetent on the ground of interest, the incompetency might be removed by a re-

(*f*) Bent *v.* Baker, 3 T. R. 27;  
Smith *v.* Prager, 7 T. R. 60. See also  
R. *v.* Boston, 4 East, 572; and Doe *d.*  
Lord Teynham *v.* Tyler, 6 Bingh. 390.

(*g*) Bent *v.* Baker, 3 T. R. 27.  
(*h*) Ph. & Am. Ev. 81.  
(*i*) P. H. & Am. Ev. 92.

lease from liability ; and such releases were very common in practice.

139. As the law of evidence continued to improve, the subject of interested witnesses continued to attract more and more attention. The rule laid down in *Bent v. Baker*, and the other cases which have been cited, was indeed well defined, and on the whole as good as any that could be devised on such a subject ; but the inconsistency of its application, and its inefficiency even in its professed object of obtaining unsuspected evidence, were obvious. It is impossible to calculate, by any rule laid down *à priori*, the influence which interest in a given cause, or in the event of a given suit, will exercise on the mind of a given individual. On some minds, a very slight interest would act sufficiently to induce perjury ; on others very great interests would be powerless. Again, it being equally impossible to detect the numberless ways in which parties may be, directly or indirectly, interested in a particular event, the rule of exclusion was restricted to the case of legal interest in the event of the suit ; the consequence of which was, that parties were often competent to give evidence, who were swayed by the strongest moral interests to pervert the truth. Thus the heir apparent to an estate, however large, was a competent witness for his ancestor in possession, on an ejectment brought by a stranger claiming the property ; while in an ejectment against a tenant for life, a remainder-man who has a legal interest to the amount of the smallest coin in the realm, was not competent to give evidence for the defendant. (j) We have already alluded to the cases of separate actions against several persons for the same assault, and of an action against one of several

(j) 1 Ph. & Am. Ev. 91 et seq.

underwriters. (*k*) And though last not least—in the very teeth of the maxims, “*nemo in propria causâ testis esse debet*,” (*l*) and “*repellitur à sacramento infamis*,” (*m*) there was not, nor is there now, any rule of law, to prevent a man who is indicted, even for a capital offense, from being convicted on the unsupported evidence of a person who avows himself an accomplice in his crime; (*n*) who is taken out of jail to bear testimony against his alleged companion; who gives that testimony under an implied promise of pardon; and who, being liable on his own confession to be punished if the government should be dissatisfied with his conduct in this respect, may be said to be giving evidence with a rope round his neck, and to be thus influenced, by the strongest of all earthly motives, to procure the condemnation of the accused. In a word, it became manifest at length, that interest should be an objection to the credit, not to the competency of a witness; but the law and practice were too firmly settled to be altered without the aid of the legislature.

140. Without stopping to refer to various statutes, passed from time to time, by which interested parties and witnesses were rendered competent in particular cases, we shall proceed to the first general enactment on the subject, the 3 & 4 Will. 4, c. 42, ss. 26 and 27, which enacted, that if a witness should be objected to as incompetent, on the ground that the verdict or judgment in the action in which it was proposed to examine him, would be admissible in evidence for or against him, such witnesses should nevertheless be ex-

(*k*) *Supra*, § 138.

(*l*) 1 Blackst. Com. 443; 3 Id. 371.

(*m*) Co. Litt. 158 a; Willes, 667.

(*n*) *R. v. Boyes*, 1 B. & S. 311, 320; *R. v. Stubbs*, 1 Dears. 555; *R. v. Attwood*, 1 Leach, C. L. 464, and 466,

note; *R. v. Durham*, Id. 478; *R. v. Jones*, 2 Campb. 132; 28 Ho. St. Tr. 487, 488; 31 Id. 315; *R. v. Hastings*, 7 C. & P. 152; *R. v. Wilkes*, Id. 273; *R. v. Sheehan, Jebb*, Cr. C. 54.

amined ; but a verdict or judgment in that action, in favor of the party on whose behalf he should have been examined, should not be admissible in evidence for him or any one claiming under him, nor should a verdict or judgment against the party on whose behalf he should have been examined, be admissible in evidence against him or any one claiming under him ; and that the name of every witness objected to as incompetent on the above ground, should be indorsed on the record or document on which the trial should be had, together with the name of the party on whose behalf he was examined, and entered on the record of the judgment ; and such indorsement or entry should be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment should be offered in evidence.

141. This statute, at best but a palliative of the evil, was virtually repealed by the 6 & 7 Vict. c. 85. But, before stating its provisions, we must advert to another ground of incompetency which has been altogether abolished by it, viz. infamy of character ; respecting which, as also the ways in which the disability could be removed, much is to be found in the books. The objections to incompetency on the ground of interest apply here with at least equal force. The principle of the exclusion seems to have varied in different cases. In some—as where the witness had been convicted of perjury, forgery, and the like—it rested, in part at least, on the notion that his testimony was likely to prove mendacious. But the wide range of the rule clearly shows that this form of incompetency, like that for disfavored religious opinions, was occasionally imposed as a punishment, in order that, by refusing to allow the witness to give evidence in a court of justice, he might be rendered a marked person

in society. And this seems supported by the circumstance that at common law a pardon, even for perjury, restored the competency of the witness and made him a new man. (*o*) But whatever the reason, "*repellitur à sacramento infamis*" (*p*) was the rule of law; and in determining what offenses should be deemed infamous, an artificial distinction was taken which caused the whole system to work very unevenly. We allude to the distinction between the "*infamia juris*" and the "*infamia facti*,"—between the infamy of an offense viewed in itself, and that arbitrarily attributed to it by law, (*q*)—it being a principle that some offenses, although "*minoris culpæ*," were "*majoris infamiæ*." (*r*) It would be loss of time to enumerate with nicety the offenses which were deemed infamous by law; it will be sufficient to say that treason and felony stood at their head, though an exception was created by 31 Geo. 3, c. 35, in favor of petty larceny, before the distinction between it and grand larceny was abolished. (*s*) A conviction for misdemeanor did not, in general, render a witness incompetent; but to this there was the general exception, of offenses coming under the description of the *crimen falsi*—such as forgery, perjury, subornation of perjury, various forms of conspiracy, and the like. (*t*) Still every crime involving falsehood or fraud had not this effect.<sup>1</sup>

(*o*) We say, at common law; for it was otherwise on a conviction of perjury under the 5 Eliz. c. 9, made perpetual by 21 Jac. 1, c. 28, s. 8. The difference is, that in the former case, the disqualification only followed as a consequence from the judgment; whereas in the latter it was by the

statute made part of the punishment. See this subject fully investigated in 2 Hargrave's Jurid. Argum. 221.

(*p*) Co. Litt. 158 a; Willes. 667.

(*q*) Ph. & Am. Ev. 14.

(*r*) Co. Litt. 6 b.

(*s*) Ph. & Am. Ev. 17.

(*t*) Id.

<sup>1</sup> See, as to infamy, *Schuyllkill v. Copeley*, 67 Pa. St. 386; *Brown v. State*, 18 Ohio St. 496; *Commonwealth v. Murphy*, 3 Pa. Law Jour. R. 290. See, as to rule in New York, *Delamater*



142. In all cases the incompetency was created, not by the conviction, for that might have been quashed on motion in arrest of judgment, (*u*) but by the judgment of the court pronounced against the offender, and which must have been proved in the usual way (*x*)—the maxim being “*ex delicto non ex supplicio emergit infamia*.” (*y*) Incompetency on the ground of infamy was removable of course by reversal of the judgment, and, in general, by pardon, (*z*) or by having undergone the punishment awarded for the offense. (*a*)

143. Such was the state of the law on this subject at the time of the passing of the 6 & 7 Vict. c. 85, whereby, after reciting that the inquiry after truth in courts of justice, was often obstructed by incapacities created by the then existing law, and it was desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony—it was enacted as follows, “No person offered as a witness, shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question or on

(*u*) Id. 20.

(*z*) § 141.

(*x*) Ph. & Am. Ev. 19, 20.

(*a*) *Pendock v. Mackinder v. Mac-*

(*y*) Id. 18.

*kinder, Willes, 665.*

*v. People*, 5 Lans. (1 N. Y.) 332; *People v. Park*, 41 N. Y. 21. The act of congress, known as “the civil rights bill,” is paramount as to the competency of witnesses, and must prevail when its provisions come in contact with state law. The first section of that act gives negroes equal rights with whites to give evidence, and they are therefore competent witnesses *Kelly v. State*, 25 Ark. 392.

any inquiry arising in any suit, action, or proceeding civil and criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person, having, by law or by consent of parties, authority to hear, receive, and examine evidence ; but every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, (b) or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offense: Provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively." Then followed two other provisoes, namely, that the Wills Act, 7 Will. 4 & 1 Vict. c. 26, should not be affected by the statute; and that in courts of equity, a defendant might be examined as a witness on the behalf of the plaintiff or of any co-defendant, saving just exceptions; and any interest which such defendant so to be examined might have in the matters, or in any of the matters in question in the cause, should not be deemed a just exception to the testimony of such defendant, but should only be considered as affecting or tending

o affect the credit of such defendant as a witness. The first of the above three provisoes is repealed, so far as relates to parties to civil proceedings, by the 14 & 15 Vict. c. 99, s. 1: and with respect to their husbands and wives by 16 and 17 Vict. c. 83, s. 4. (*c*)

144. Not only is the inclination of our modern judges and lawgivers in favor of receiving the evidence of witnesses, leaving its value to be estimated by the jury, but the propriety of expunging from our jurisprudence the title "Incompetency of witnesses" has been strongly and ably advocated, as well as candidly and temperately defended. (*d*) For reasons stated in the Introduction to this work, (*e*) it seems that, for general purposes at least, the principle of incompetency ought to be confined to pre-appointed, as contradistinguished from casual evidence; and the legislature has of late years inclined to this view. While, on the one hand, it has almost abolished the rules rejecting casual witnesses as incompetent, it has, on the other, interposed with regulations requiring certain important pieces of pre-appointed evidence to be attested in some particular way. Thus, the 6 & 7 Vict. c. 85,—which, as we have seen, removes all objections to competency on the ground of interest in most cases, and of infamy in all,—contains an express proviso, that nothing in it shall repeal the Wills Act, 7 Will. 4 & 1 Vict. c. 26, by which (as explained by 15 & 16 Vict. c. 24), all wills must be in writing and attested by two or more witnesses; and which, by section 15, enacts that if a will contains any beneficial devise, legacy, gift, &c., to an attesting witness, it shall be void, in order that he may be competent to prove the execution of the will. And the 32 & 33 Vict. c.

(*c*) See those statutes, *infra*.

(*e*) *Id*.

(*d*) *Intro*d. pt. 2, § 62.

62, s. 24, requires that all cognovits, and warrants of attorney to confess judgment, shall be subscribed by an attorney, acting on behalf of the party by whom they are executed, and expressly named by him.

145. We now proceed to consider more in detail, the three grounds of incompetency which still exist in our law, namely: 1. Incompetency from want of reason and understanding; 2. Incompetency from want of religion; and 3. Incompetency from interest.

146. 1. Incompetency from want of reason and understanding. The causes of this incompetency are twofold—Deficiency of intellect, and Immaturity of intellect. The objection on the first of these grounds, rarely presents itself to the competency of a witness; and if the defect appears in the course of his examination, it is usually made matter of comment to the jury.

147. Our books lay down generally that persons of “non-sane memory,” and who have not the use of reason, are excluded from giving evidence, (*f*)<sup>1</sup> but they are not quite agreed as to the reason of this—some basing it on the ground that such persons are insensible to the obligation of an oath; (*g*) while others, with more justice, say it is because all persons who are examined as witnesses must be fully possessed of their understanding,—that is, of such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong. (*h*) Probably both reasons have had their influence. (*i*)

(*f*) Com. Dig. Testmoigne, A. 1; (g) 1 Greenl. Ev. § 365, 7th ed. Co. Litt. 6 b; Ph. & Am. Ev. 4; Tayl. Ev. § 1247, 4th ed.  
Peake, Ev. 122, 5th ed. (*h*) Peake's Ev. 122, 5th ed.

(i) Ph. & Am. Ev. 4.

<sup>1</sup> McCutcheon v. Pique, 4 Heisk. (Tenn.) 565.

According to the Roman law, "*Furiosus absentis loco est.*" (*j*)

148. But who are thus excluded? What is the extent of the rule? A man of "non-sane memory" is defined by Littleton, "*qui non est compos mentis.*" (*k*) This is corroborated by Sir E. Coke in his Commentary, (*l*) who adds, "Many times, as here it appeareth, the Latin word explaineth the true sense, and (Littleton) calleth him not *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus*, *stultus*, or the like, for *non compos mentis* is most sure and legal." He then goes on, "*Non compos mentis* is of four sorts. 1. An idiot, which from his nativity, by a perpetual infirmity, is *non compos mentis*. 2. He that by sickness, grief, or other accident, wholly loses his memory and understanding. 3. A lunatic that hath sometime his understanding and sometime not, '*aliquando gaudet lucidis intervallis*,' and therefore he is called '*non compos mentis*,' so long as he hath not understanding. 4. Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken." A similar classification is adopted in modern works on evidence. (*m*) These four sorts of persons are incompetent witnesses, until the cause of incompetency is removed. Thus, although a person deaf and dumb from birth is presumed by law to be an idiot, (*n*) yet if he can be communicated with either by signs and tokens, (*o*) or by writing, (*p*) and it appears that he is possessed of intelligence, and under-

(*j*) Dig. lib. 50, tit. 17, l. 124, § 1.  
See also 4 Co. 125 b, 126 a.

(*k*) Litt. sect. 405.

(*l*) Co. Litt. 246 b.

(*m*) Ph. & Am. Ev. 4; 1 Greenl. Ev. § 365, 7th ed.

(*n*) 1 Hale, P. C. 34.

(*o*) 1 Phill. Ev. 7, 10th ed.; R. v. Ruston, 1 Leach, C. L. 408; R. v. Steel, Id. 452.

(*p*) 1 Ph. Ev. 7, 10th ed.; Morrison v. Lennard, 3 C. & P. 127.

stands the difference between truth and falsehood, (*q*) he may be examined as a witness. In one case, where it appeared that such a person could write, Best, C. J. doubted whether he ought not to be compelled to give his evidence in that way, and not by signs. (*r*) But it would be difficult to maintain this as a proposition of law, even supposing it to hold good as a principle of convenience. Neither of these modes of giving evidence is derivative from, or secondary to the other; besides which, a deaf and dumb witness might be very expert in making and understanding signs, and yet express his thoughts very indifferently in writing. In a much more recent case, before Lord Campbell, which was an action for seduction, the seduced party was deaf and dumb, but could write very well, and two letters written by her to the defendant were put in evidence. Her examination in court, however, was chiefly carried on by signs, and, occasionally, when these were not understood, by writing. (*s*) So a lunatic while in a lucid interval is a competent witness: (*t*) but whether the evidence of a monomaniac, *i. e.* a person insane on only one subject, can be received on matters not connected with his delusion, remained unsettled until recently. And some text writers thought it the safest rule to exclude the testimony of such persons, it being impossible to calculate with accuracy

(*q*) Formerly the witness could not be examined unless he appeared to understand the nature of an oath. Now, however, a witness may be examined, even although he be considered "incompetent to take an oath," from the fact that, in the opinion of the judge, "the taking of an oath would have no binding effect on his conscience." But he is still liable to be indicted for perjury, if he "will-

fully and corruptly give false evidence." See 32 & 33 Vict. c. 68, s. 4. The test of his competency to give evidence, therefore, would seem to be that stated in the text.

(*r*) *Morrison v. Lennard*, 3 C. & P. 127.

(*s*) *Bartholomew v. George*, Kent Sp. Ass. 1851, MS.

(*t*) Com. Dig. Testmoigne, A. 1; Ph. & Am. Ev. 5.

the extent and influence of such a state of mind. (*u*) This would be hard measure. A monomaniac may perfectly understand the nature and obligation of an oath; his general intellect may equal or surpass that of his interrogators; and indeed he seems much in the condition of a lunatic who is in a perpetual lucid state on all subjects save one. A medical man, eminent in the treatment of the insane, deposed in our presence, in a court of justice, that while he was physician to a large lunatic establishment, some alterations were required in the building, and that the best plans for the purpose, and those which were ultimately adopted, were sent in by one of the insane patients. In Ray's Medical Jurisprudence of Insanity, (*v*) a case is mentioned, which was tried before the Supreme Court for the county of Lincoln in Maine, America, in May, 1833, in which a witness was produced who was perfectly sane and satisfactory in his evidence on all points except that he believed himself to be an inspired apostle. And on an application to the Court of Exchequer for a habeas corpus ad testificandum, to bring up the body of a person confined as a lunatic, Parke, B., said, "If you make an affidavit that he is not a dangerous lunatic, and that he is in a fit state to be brought up, the habeas corpus should be granted." (*x*)

**149.** This question seems now set at rest by the case of *R. v. Hill*, (*y*) decided by the court of Criminal Appeal. The accused, who was attendant of a ward in a lunatic asylum, was indicted for the manslaughter of one of the patients under his care. At the trial before Coleridge and Cresswell, JJ., at the

(*u*) Roscoe, *Crim. Ev.* 123, 4th ed.

(*v*) § 304. Case of Jacob Schwartz.

(*x*) *Fennell v. Tait*, 1 C. M. & R. 584.

(*y*) 2 Den. & P. C. C. 254.

Central Criminal Court, it being opened by the prosecution that a witness of the name of Donelly would be called, who was a patient in the same ward with the deceased, evidence was gone into on both sides in order to found and meet the objection to his competency. A witness stated that Donelly labored under the delusion that he had a number of spirits about him continually talking to him ; but that that was his only delusion : and two medical witnesses deposed that he was rational on all points not connected with it ; while one added, that he was quite capable of giving an account of any transaction that happened before his eyes. Donelly was then called, and before being sworn was examined by the prisoner's counsel. He said, "I am fully aware that I have a spirit, and twenty thousand of them ; they are not all mine ; I must inquire—I can where I am ; I know which are mine. Those ascend from my stomach to my head, and also those in my ears ; I do not know how many they are. The flesh creates spirits by the palpitation of the nerves and the 'rheumatics ;' all are now in my body and round my head ; they speak to me incessantly—particularly at night. That spirits are immortal, I am taught by my religion from my childhood, no matter how faith goes ; all live after my death, those that belong to me and those which do not ; Satan lives after my death, so does the living God." After more of this kind, he added, "They speak to me constantly ; they are now speaking to me ; they are not separate from me ; they are round me, speaking to me now ; but I can't be a spirit, for I am flesh and blood ; they can go in and go out through walls and places which I cannot. I go to the grave, they live hereafter—unless, indeed, I have a gift different from my father and mother that I do



not know. After my death my spirit will ascend to Heaven, or remain in purgatory. I can prove purgatory. I am a Roman Catholic; I attended Moorfields, Chelsea chapel, and many other chapels round London. I believe purgatory; I was taught that in my childhood and infancy. I know what it is to take an oath; my catechism taught me from my infancy when it is lawful to swear; it is when God's honor, our own or our neighbor's good require it. When man swears, he does it in justifying his neighbor on a Prayer-book or obligation. My ability evades while I am speaking, for the spirit ascends to my head. When I swear, I appeal to the Almighty; it is perjury the breaking a lawful oath or taking an unlawful one; he that does it will go to hell for all eternity." He was then sworn, and, says the report, gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed. He was in some doubt as to the day of the week on which it took place, and on cross-examination said, "These creatures insist upon it it was Tuesday night, and I think it was Monday;" whereupon he was asked, "Is what you have told us what the spirits told you, or what you recollect without the spirits?" and he said, "No; the spirits assist me in speaking of the date; I thought it was Monday, and they told me it was Christmas Eve—Tuesday; but I was an eye-witness, an ocular witness, &c." The court received his evidence, reserving the question of his competency for the Court of Criminal Appeal. The accused having been convicted, the case was argued before Lord Campbell, C. J., Coleridge and Talfourd, JJ., and Alderson and Platt, BB.; when the counsel for the prisoner contended, that Donelly was non compos mentis, but was a lunatic within the legal definition

of that term; and that as soon as any unsoundness of mind is manifested in a witness, he ought to be rejected as incompetent, citing, *inter al.*, *Com. Dig. Testmoigne*, A 1. The court, however, without hearing counsel on the other side, unanimously upheld the conviction. Lord Campbell, in delivering his judgment, said, "The question is important, and has not yet been solemnly decided after argument. But I have no doubt that the rule was properly laid down by Parke, B., in the case that was tried before him, and that it is for the judge to say, whether the insane person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath; and then the jury are to decide on the credibility and weight of his evidence. As to the authorities that have been cited, the question is, in what sense the term '*non compos*' was there used. A man may, in one sense, be *non compos*, and yet be aware of the nature and sanction of an oath. In the particular case before the court, I think that the judge was right in admitting the witness; I should have certainly done so myself. . . . It has been argued that any particular delusion, commonly called *monomania*, makes a man inadmissible. This would be extremely inconvenient in many cases in the proof, either of guilt or innocence; it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the judge must, in all such cases, determine the competency, and the jury the credibility. Before he is sworn, the insane person may be cross-examined, and witnesses called to prove circumstances which might show him to be inadmissible; but, in the absence of such proof, he is *primâ facie* admissible, and the jury must attach what weight they think fit to his testimony." Tal-

fourd. J., observing, "It would be disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions;"—Lord Campbell added, "The rule which has been contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him." (y)

150. But while our books point out the various causes of mental alienation which disqualify from giving evidence, they say little or nothing as to the intensity of it required for this purpose. In truth there are two, if not more, distinct standards of mental alienation known to the law. First, that which is sufficient to exculpate from a criminal charge: and here it is settled that ordinary lesion of intellect is not sufficient—there must be such an absence of intellect that the accused, when he did the act, was unconscious that he was committing a crime prohibited by law. (z) Second. The degree of insanity which will support a commission of lunacy. In the time of Lord Eldon the Court of Chancery assumed, perhaps usurped, the jurisdiction of issuing commissions of lunacy against "persons of unsound mind," *i. e.*, persons in a state contradistinguished from idiocy and lunacy,—a state of mental imbecility and incapacity to manage their affairs. (a) Third. The degree of unsoundness of mind which will avoid contracts, deeds, wills, and the like, seems to hold an intermediate place between these. (b) Calm reflection will

(y) See *Waring v. Waring*, 6 Moo. P. C. C. 341.

(z) Answer of the judges to the House of Lords, 8 Scott, N. R. 595; 1 Car. & K. 130; *R. v. Higginson*, 1d. 129; *R. v. Vaughan*, 1 Cox, Cr. Ca. 80.

(a) *Shelford on Lunacy*, pp. 5, 104 2nd ed.

(b) As to the degree of unsoundness of mind which will avoid a will, the law, as now settled, is, that the existence on the mind of the testator of a delusion which is compatible with the

convince, that if mental alienation is to be retained in our law as a ground of incompetency, it should be restricted to cases where it is found impossible to communicate with the witness, so as to make him understand that he is in a court of justice and expected to speak the truth. Any eccentricities or aberrations which fall short of this, are surely only matter of comment to the jury, as to the reliance to be placed on his testimony. And here it is important to observe once for all, that when reading what our old lawyers have written on the subject of insanity, we should never forget how little the subject was understood in their day, and the shocking mistakes in the treatment of the insane which then prevailed. As some one has observed, "their notions of insanity were founded on observation of those wretched inmates of the mad-house, whom stripes and chains, cold and filth, had degraded to the stupidity of an idiot, or exasperated to the fury of a demon." Now, the researches of modern physiologists have shown, that madness is not an infliction sent direct from Heaven, but a bodily disease, which may often be completely cured; and that there are many inferior forms of diseased or disordered mind and imagination, which influence the conduct of persons who are, in other respects, perfectly capable of taking care of themselves and transacting the ordinary business of life. (c) Some even go so far as to assert

retention of his general powers and faculties, will not avoid the will, unless the delusion were such as was calculated to influence the testator in making it. *Banks v. Goodfellow*, L. Rep., 5 Q. B. 549; overruling the dicta on this point in *Waring v. Waring*, 6 Moo. P. C. C. 341 and *Smith v. Tebbitt*, L. R., 1 P. & D. 398. See also *Bridgeman v. Green*,

*Wilmot's Notes*, 58; *Blackford v. Christian*, 1 Knapp, P. C. C. 73, 78.

(c) Viewing the subject in a physiological light, Dr. Beck, in his *Medical Jurisp.* ch. 13, 7th ed., enumerates the following forms of mental alienation: 1. Mania; 2. Monomania (including melancholy); 3. Dementia; 4. Incoherent madness (holding a sort of

that there exists a form of the disease, to which they have given the name of "moral insanity," in which no delusion of any kind exists; but the patient's moral character is revolutionized, and he is hurried against his will, by some uncontrollable impulse, into the commission of acts of violence and crime. (*d*) Although this state of mind is not recognized in our jurisprudence, and its existence as matter of fact is extremely questionable, still the above discoveries show how arbitrary and imperfect any line, drawn by law on such a subject as the present, must necessarily be; and, as an eminent modern writer well expresses it, "The subtle and shifting transformations of wild passion into maniacal disease, the returns of the maniac to the scarcely more healthy state of stupid anger, and the character to be given to acts done by him when near the varying frontier which separates lunacy from malignity, are matters which have defied all the sagacity and experience of the world." (*e*)

151. Next, with respect to the evidence of children. Immaturity of intellect is of course a ground of incompetency, as much as natural defect or subsequent deprivation of intellect. But there is another difficulty in dealing with this subject, namely that, while the intellect of a child may be sufficiently developed, to enable him to give an intelligible account of what he has seen or heard, he may be ignorant, not only of the nature and obligation of an

middle place between mania and dementia); 5. Congenital idiotism; besides various subdivisions: He also (p. 487 et seq.) mentions some forms of disease, which, either in a partial or temporary manner, bear a strong resemblance to insanity. These are the delirium of fever, hypochondriasis,

hallucination, epilepsy, nostalgia, delirium tremens, &c.

(*d*) Beck's Med. Jurisp. 436, 477, 7th ed.; Dr. F. Winslow, in the papers of the Juridical Society, vol. 1, p. 595, &c.

(*e*) Sir J. Macintosh's Hist. Engl. vol. 3, p. 36.

oath, but even of the obligation to speak the truth; and although, in the case of an adult witness, the want of early religious education may have been supplied by experience or reflection, it would be idle to look for these in a person of tender years. For these reasons, the testimony of children has always been a source of embarrassment to tribunals; and the laws of many nations have cut, instead of attempting to unravel, the knot, by arbitrarily rejecting such testimony when the child is under a definite age (*f*)—a course objectionable on many grounds; and principally, as it all but proclaims impunity to certain offenses of a serious nature against the persons of children, which it is next to impossible to establish without receiving their account of what has taken place. Besides, children of the same age differ so immensely in their powers of observation and memory, that no fixed rule, even approximating to the truth, can be laid down. In this case at least it may truly be said, “Nature makes her mock of those

(*f*) The general rule of the civilians, subject however to several exceptions, was, that persons under the age of puberty were incompetent to give evidence (Huberus, *Præl. Jur. Civ. lib. 22, tit. 5, n. 2, iv.*; Mascard. *dè Prob. Concl. 1253*; 1 *Ev. Poth. § 789*). Some of their authorities say that minors under twenty years were rejected in criminal cases. Mascard. *de Prob. Concl. 1320, N. 9 et seq.*; and *1253, N. 14*. This rule appears to have been based on the language of the Digest (*lib. 50, tit. 17, l. 2, § 1*): “*Impubes omnibus officiis civilibus debet abstinere*; but more particularly on *lib. 22, tit. 5, l. 3, § 5*: “*Lege Julia de vi cavetur, ne hac lege in reum testimonium dicere liceret, qui se ab eo, parente ejus liberaverit:*

*quive impuberes erunt, &c.*”—rather a frail foundation for the position, that the jurisprudence of ancient Rome rejected the testimony of minors in general; for the law just quoted only does so on certain capital charges of public violence. *Expressio unius est exclusio alterius*; and we have the positive testimony of Quintilian, that in his time the evidence even of very young children was occasionally received, or at least was not rejected as matter of course. See *Inst. Orat. lib. 5, c. 7, ver. fin.*; and Pothier in *loc. cit.* The Hindu law seems to have rejected the evidence of minors under fifteen—an age in that climate corresponding probably to twenty or more in ours. Translation of Pootee, c. 3, sect. 8, in Halhed’s *Code of Gentoo Laws*.

systems of tactics, which human industry presents as leading-strings to human weakness." (*g*)

152. As to the old law on this subject, our ancestors adopted the maxim "minor jurare non potest," (*h*) but with some exceptions—at the age of twelve years, for instance, an infant might be called on to take the oath of allegiance, &c. (*i*) And although, as will be shown presently, the evidence of children was often rejected, it was not solely on the ground of their supposed incapacity to take an oath; for a difficulty was likewise felt, in fixing the age at which they should be held responsible to the criminal law,—a matter now fully settled thus, that for this purpose fourteen is, with some few exceptions, full age; that between seven and fourteen an infant is presumed to be *doli incapax*, but may be shown to be otherwise; but that, under seven, there is (whether rightly or not) a *præsumptio juis et de jure* that he cannot have a mischievous discretion. (*j*)

153. Sir Edward Coke in his 1st Institute (*k*) states broadly that a person "not of discretion," cannot be a witness; and in another part of the same work, (*l*) he defines the age of discretion to be fourteen years. More than half a century later, Sir Matthew Hale in his Pleas of the Crown (*m*) lays down the law thus—"Regularly an infant under fourteen years is not to be examined upon his oath as a witness; but yet the condition of his person, as if he be intelligent, or the nature of the fact, may allow an examination of one under that age; as in

(*g*) 3 Benth. Jud. Ev. 304.

(*h*) Co. Litt. 172 b.

(*i*) Co. Litt. 68 b, 78 b, 172 b.

(*j*) 4 Blackst. Comm. 22, 23; 1

Hale, P. C. 20 et seq.; and *infra*, bk.

3, pt. 2, ch. 2.

(*k*) Co. Litt. 6 b.

(*l*) Co. Litt. 247 b.

(*m*) 1 Hale, P. C. 302; see also *Id.*

634; and 2 *Id.* 279.

case of witchcraft, an infant of nine years old has been allowed to be a witness against his own mother. And the like may be in a rape of one under ten years upon the stat. of 18 Eliz. c. 6. And the like hath been done in case of buggery upon a boy, upon the stat. 25 Hen. 8, c. 6. And surely in some cases one under the age of fourteen years, if otherwise of a competent discretion, may be a witness in case of treason." In another place, however, (*n*) after telling us that instances have been given of very young witnesses sworn in capital causes, viz., one of nine years old, he adds, "Yet such very young people under twelve years old I have not known examined upon oath, but sometimes the court for their information have heard their testimony without oath, which, possibly being fortified with concurrent evidences, may be of some weight, as in cases of rape, buggery, witchcraft, and such crimes, which are practiced upon children." In the case of *Young v. Slaughterford*, (*o*) T. T. 1709, which was an appeal of murder, tried at bar, L. C. J. Holt held, that an infant under twelve years of age might be admitted as a witness, if he knew the danger of an oath; and, that appearing, he was admitted. But in *R. v. Travers*, (*p*) at the Kingston spring assizes of 1726, which was an indictment for a rape on a child under the age of seven years, L. C. B. Gilbert rejected the evidence of the child, and the prisoner was acquitted. A fresh indictment was then found for assault with intent to ravish, which was tried before L. C. J. Raymond. The child had in the meantime attained the age of seven, and on its evidence being objected to, on the ground that a child six or seven years ought, for the purposes of testi-

(*n*) 2 Hale, P. C. 283-4.

(*p*) 1 Stra. 700.

(*o*) 11 Mod. 228.



mony, to be considered in the same light as a lunatic or madman, the counsel for the prosecution cited a case at the Old Bailey, in 1698, where C. B. Ward admitted the evidence of a child under ten, which had been examined as to the nature of an oath, and had given a reasonable account of it. The Lord Chief Justice, however, rejected the evidence, and cited the case of one Steward, who was tried at the Old Bailey in 1704, for rapes on two children; in the first of which the child was ten years old, and yet she was not admitted as a witness, until other evidence had been given which tended strongly to show the guilt of the defendant, and until the child herself had given a good account of the nature of an oath. The second child was between six and seven years old; and it was unanimously agreed that one so young could not be admitted to be an evidence; and on that ground her testimony was rejected. But although L. C. B. Gilbert rejected the evidence of the child, in the first case of *R. v. Travers*, it was probably on the ground she was ignorant of the nature of an oath, or deficient in natural intelligence; for in his *Treatise on Evidence* (*q*) he lays down the rule thus—"Children under the age of fourteen are not regularly admitted as witnesses, and yet at twelve they are obliged to swear allegiance in the leet. There is no time fixed wherein they are to be excluded from evidence; but the reason and sense of their evidence is to appear from the questions propounded to them, and their answers to them." And lastly, during the argument in the case of *Omychund v. Barker*, (*r*) in 1744, we find L. C. J. Lee informing counsel, who was relying on the language of Sir Matthew Hale in one of the passages above referred to, that it had been de-

(*q*) *Gilb. Ev.* 144, 4th ed.

(*r*) 1 *Atk.* 29.

terminated at the Old Bailey, upon mature consideration, that a child should not be admitted as an evidence without oath; and L. C. B. Parker added, that it was so ruled at Kingston assizes before Lord Raymond.

154. Through all this inconsistency and confusion we can trace two principles working their way. 1. That if the testimony of an infant of tender years is to be received at all, it ought to be received from the infant itself, and not through a statement presented obstetricante manu. 2. That a witness being an infant of tender years, is no ground for relaxing the rule, "*In judicio non creditur nisi juratis.*" (s) At length, in 1779, both these principles received a solemn judicial recognition in *R. v. Brasier*, (t) which is the leading case on the subject. The prisoner was indicted for an assault with intent to commit a rape on an infant under the age of seven years, who was not examined as a witness; and the chief evidence for the prosecution was the account she had given of the transaction to two other persons. The prisoner having been convicted, the case was considered by the judges, who decided that the conviction was wrong. They held unanimously that "no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an

(s) Cro. Car. 64.

(t) 1 Leach, C. L. 199; 1 East, P. C. 443. It is to be remarked that a few years previous a similar opinion had been expressed by Gould, J., on an indictment for rape on an infant, between six and seven years of age

The prisoner having been acquitted on the unsworn testimony of the child, the judge mentioned the matter to the other judges, a majority of whom agreed with him. *R. v. Powell*, 1 Leach's Crown Law, 110.

oath ; for there is no precise or fixed rule, as to the time within which infants are excluded from giving evidence ; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court ; but if they are found incompetent to take an oath, their testimony cannot be received."

155. *Brasier's case* settled the modern law and practice, relative to the admissibility of the testimony of children. As, in the criminal law, "*malitia supplet ætatem*," (*u*) so here the maxim of the canonists was followed ; "*prudencia supplet ætatem* ;" (*x*) — the rule having been thus stated by Alderson, B. : "It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge would allow him to be sworn." (*y*) And although, since the 32 & 33 Vict. c. 68, s. 4, it is no longer necessary, in order to render children of tender years admissible as witnesses, that they should be sworn, or be able to understand the nature and obligation of an oath, yet—inasmuch as their evidence would even now be inadmissible, if they appeared not to understand the difference between truth and falsehood (*z*)—it follows, as was said by the court in *Brasier's case*, that their admissibility still depends on "the sense and reason they entertain of the danger and impiety of falsehood ; which is to be collected from their answers to questions propounded to them by the court." Whether the child's evidence is admissible, if this "sense and reason" "of the danger and impiety of falsehood" be owing merely to special in-

(*u*) Dy. 104 b ; 1 Hale, P. C. 26 ; 4 (*y*) R. v. Perkins, 2 Moo. C. C. Blackst. Comm. 23, and 212. 139.

(*x*) Lancel. Inst. Jur. Can. lib. 2, (*z*) See *supra*, § 148, note (q). tit. 10, § 5.

struction, given to the child with a view to the trial, and be not the result of the child's general religious education, has been made matter of question. In *R. v. Williams*, (a) which was an indictment for murder, a female child of eight years old was called as a witness. It appeared that, up to the death of the deceased, the child had never heard of God, or of a future state of rewards and punishments, had never prayed, and did not know the nature of an oath; since that time she had been visited twice by a clergyman who had given her some instruction as to the nature and obligation of an oath; but she gave a very confused account of it, and had, says the report, "no intelligence as to religion or a future state." Her testimony was objected to on the ground, that if it were sufficient that a witness should understand the nature of an oath, merely from information recently communicated, a clergyman might always be called to instruct a witness on that subject, when he came into the box to be examined on the trial. And, the counsel for the prosecution having cited *R. v. Wade*, 1 Moo. C. C. 86, Patteson, J., said, "I must be satisfied that this child feels the binding obligation of an oath, from the general course of her religious education. The effect of the oath upon the conscience of the child, should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that, previous to the happening of the circumstances to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony."

(a) 7 C. & P. 320.

But although there can be no doubt of the correctness of the decision in the above case, nor that the circumstance, that the child had been instructed in the nature of an oath after the offense had been committed, was one for the judge to consider, when called on to decide as to her capacity to be sworn; the dogma—if, indeed, Patteson, J., intended to lay it down—that the child was incompetent to take an oath, because her sense of the binding obligation of the oath was not the result of her general religious education, was at variance with other authorities, (a) and is indefensible on principle.

156. When a material witness in a criminal case is an infant of tender years, (b) the practice has been for the judge to examine him, with the view of ascertaining whether he is aware of the nature and obligation of an oath, and the consequences of perjury. And if it is ascertained before the trial, that a material witness is of tender years and devoid of religious knowledge, the court will, in its discretion, postpone the trial, and direct that he shall in the meantime receive due instruction on the subject. (c) But in a recent case, where a father was charged with violating his daughter, aged twelve, Alderson, B., refused to postpone the trial for the purpose of her being taught the nature of an oath; stating that all the judges were of opinion that it was an incorrect proceeding; that it was like preparing or getting up a witness for a par-

(a) See Tayl. Evid. § 1250, 5th ed., and the cases there referred to. Also the cases cited *infra*.

(b) What shall be considered tender years for this purpose does not appear to be defined, although, by analogy to the general law respecting infancy, the requisite degree of religious knowledge should be presumed at the age of

fourteen. But the court has a right to examine as to the religious knowledge even of an adult, if it suspects him to be deficient. See *infra*.

(c) Stark. Ev. 117, 4th ed.; 1 Phill. Ev. 9, 10th ed.; Tayl. Ev. 1247, 5th ed.; 1 Leach, C. L. 430, note (a); R. v. Nicholas, 2 Car. & K. 246; R. v. Bayliss, 4 Cox, Cr. Ca. 23.

ticular purpose, and on that ground was very objectionable. (*d'*) If this be correctly reported, not only is it at variance with a series of previous authorities, (*e*) but, as is remarked in the text work where the case is found, "By the strict application of this rule, a parent, by neglecting his moral duty as to the education of his child, may thus obtain an immunity for the commission of a heinous crime." (*f*)

**157.** On trials for homicide, the general rule of law which rejects second-hand or hearsay evidence is relaxed, so far as to render admissible the declarations of the deceased as to the cause of his death, provided they were made by him at a time when he was under the conviction that death was impending. (*g*)<sup>1</sup> This

(*d*) 1 Phill. Ev. 10, 10th ed.

(*f*) 1 Phill. Ev. 10, note (3), 10th ed.

(*e*) See *supra*, note (c).

(*g*) See *infra*, bk. 3, pt. 2, ch. 4.

<sup>1</sup> See *ante*, note 1, p. 113. Declarations by third persons, in reference to the offense with which the defendant is charged, are hearsay, and consequently inadmissible in evidence (*Bergen v. People*, 17 Ill. 426; *State v. Reidel*, 26 Iowa, 430; *Cheek v. State*, 35 Ind. 492; *State v. Vincent*, 24 Iowa, 570). Hence, on an indictment for murder, the admissions of other persons that they killed the deceased are not evidence (*State v. Duncan*, 6 Ired. 236; *Smith v. State*, 9 Ala. 990). And evidence of threats by other persons is inadmissible (*State v. Duncan*, 6 Ired. 236). And so of declarations of the deceased before his death, that he was about to disappear (*State v. Vincent*, 24 Iowa, 570). But if such third persons, on being examined as witnesses, had implicated the prisoner by their testimony, evidence of their declarations that they were guilty of the offense is admissible to discredit them (*Wharton on Homicide*, § 603; *Smith v. State*, 9 Ala. 920). In conformity with this rule, where, on trial of an indictment for murder, a witness for the prosecution testified that she had seen the two defendants come from a room where the dead body was found, under suspicious circumstances, it was held that the prosecution could not show by other witnesses that she at once, while giving the alarm, gave the names of the two persons thus seen. And with this accords the well-known proposition that a witness cannot in general be corroborated by proof of prior

exception has been allowed, partly from necessity, partly on the ground that the situation of the party may fairly be taken as conferring on what he says a religious sanction equal to that supplied by an oath, and partly because, on such occasions, witnesses rarely have any interest in deceiving. But as, when children of tender years are examined as witnesses, the court has the security of inquiring into their intelligence and religious knowledge, it seems to follow that their dying declarations are not *prima facie* receivable where those of an adult would be;<sup>1</sup> for the latter will be rejected if it appears that the deceased was a person who, through ignorance or any other cause, was not likely to be impressed with a religious sense of his approaching dissolution. (*h*) In *R. v. Pike*, (*i*) two prisoners were indicted for the murder of a child four years old. It was proposed to put in evidence a statement made to her mother by the child, shortly before her death, at a time when she thought she was dying, as to the manner in which she had been treated by the prisoners. Park, J. (with the concurrence of Parke, J.) rejected the statement, saying, "As this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. . . . Indeed, I think that from her age, we must take it that she could not possibly have had any idea of that kind." But without in the least questioning the propriety of the decision in this case, we may well doubt whether

(*h*) See *infra*, bk. 3, pt. 2, ch. 4.

(*i*) 3 C. & P. 598.

statements made by him to others. Wharton on Homicide, § 603; on Criminal Law, § 12, 7th ed.; *Commonwealth v James*, 99 Mass. 438.

<sup>1</sup> But see note 1, p. 113.

the above dictum can be supported. There certainly is no *præsumptio juris et de jure* on this subject ; and, however unlikely it may be, that a child of four years old should have clear ideas respecting religion and divine punishment for falsehood, yet if that fact were shown affirmatively, its dying declarations ought to be received. In *R. v. Perkins*, (*k*) it was held by the judges on a point reserved, that the dying declarations of a child ten years old were receivable under such circumstances. But the question still remains, at what age is the presumption of the absence of intelligence, and of ignorance on religious subjects, to cease, so as to render this affirmative proof unnecessary ? Analogy points to fourteen years, but judicial decisions are silent.

158. As to the effect of the evidence of childrer when received : "Independently of the sanction of an oath," says a text work, (*l*) "the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons ; and what is wanted in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive. It is clear that a person may be legally convicted upon such evidence, alone and unsupported ; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given." Quintilian (*m*) reckons among doubtful proofs "*parvulorum indicia ; quos pars altera nihil fingere, altera nihil judicare dictura*

(*k*) 2 Moo. C. C. 135.

(*l*) Ph. & Am. Ev. 7.

(*m*) Inst. Orat. lib. 5, c. 7, vers.<sup>1</sup>  
fin.



est." This must not, however, be taken too literally: some children indulge in habits of romancing, which often lead them to state as facts, circumstances having no existence but in their own imaginations; and the like consequence is not unfrequently induced in other children, by the suggestions or threats of grown-up persons, acting on their fears and unformed judgment.<sup>1</sup>

159. 2. The next ground of incompetency may be styled "incompetency from want of religion." To the natural and moral sanctions of the truth of statements made by man to man, it has been usual in most, if not in all ages and countries, to join the additional security of "An Oath;" *i. e.* a recognition by the speaker, of the presence of an invisible Being superior to man, ready and willing to punish any deviation from truth, invoking that Being to attest the truth of what is uttered, and in some cases calling down his vengeance in the event of falsehood. (*n*) On this principle, courts of justice in most nations exact an oath, as a condition precedent to the reception of evidence; and among us in particular, "In judicio non creditur nisi juratis," (*o*) has been a legal maxim from the earliest time. Hence it followed that, by the common law, the evidence of a witness must be rejected who either was ignorant of, or who denied the existence of such a superior power, or refused to give the required security to the truth of his

(*n*) See as to oaths, Introd. 2, §§ 56      (*o*) Cro. Car. 64.  
et seq.

<sup>1</sup> It was held, in *Flanigan v. State*, 25 Ark. 92. and in *Warner v. State*, Id. 447, that "there is no precise age within which children are absolutely excluded as witnesses. If they are of sufficient natural intelligence, and comprehend the nature and effect of an oath, their testimony should be admitted. See cases cited in note 1, p. 212.

testimony; and the present source of incompetency may accordingly be considered under three heads: 1st, Want of religious knowledge; 2nd, Want of religious belief; and 3rd, Refusal to comply with religious forms.

**160.** The first of these may be disposed of in a word; the exception arising principally in the case of children, whose competency has already been considered. (*p*) But the same principles apply where an adult, deficient in the requisite religious knowledge, is offered as a witness. (*q*)

**161.** 2nd, Incompetency for want of religious belief. This has been in a great degree anticipated in a former part of this chapter, (*r*) where we took occasion to show the injustice and absurdity of the old practice, of inflicting incompetency as a punishment for erroneous opinions, or even for misconduct not likely to affect the veracity of the witness. The history of our law on this subject was there traced—the gradual establishment of the great and sound principles that courts of justice are not schools of theology—that the object of the law in requiring an oath, is to get at the truth relative to the matters in dispute, by obtaining a hold on the conscience of the witness;—and, consequently, that every person ought to be admitted to give evidence, who believes in a Divine Being, the avenger of falsehood and perjury among men, and who consents to invoke, by some binding ceremony, the attestation of that Power to the truth of his deposition. But how is the state of mind of the proposed witness on these subjects to be ascertained? It is clear that disbelief in the existence and moral Government of God are not to be presumed. (*s*) If such disbelief exist, this is

(*p*) *Supra*, §§ 151 et seq.

(*r*) *Supra*, §§ 134 et seq.

(*q*) *R. v. White*, 1 Leach, C. L. 430;  
*R. v. Wade*, 1 Moo. C. C. 86.

(*s*) 6 Co. 76 a; 1 Greenl. Ev. §§ 42  
and 370, 7th ed.

a psychological fact, and is consequently incapable of proof except by the avowal of the party himself, or the presumption arising from circumstances. (*t*) According to most of our text writers and the usual practice, the proper and regular mode of procedure is by examining the party himself; (*u*) while some authorities go so far as to assert that this is the only mode. (*v*) Professor Christian, on the other hand, informs us, that he "heard a learned judge declare at nisi prius, that the judges had resolved not to permit adult witnesses to be interrogated respecting their belief of the Deity and a future state;" (*x*) and he adds, that "it is probably more conducive to the course of justice that this should be presumed till the contrary is proved. And the most religious witness may be scandalized by the imputation, which the very question conveys." This last is a strange argument; for the most respectable witness may be scandalized by questions imputing to him any possible form of crime, and yet such questions may be and frequently are put; and it is essential for the ends of justice that the right to put them should exist. Some of the American authorities adopt the conclusion of Professor Christian; but for different reasons. Witnesses, say they, are not allowed to be questioned as to their religious belief, not because it tends to disgrace them, but because it would be a personal scrutiny into the state of their faith and conscience, foreign to the spirit of free institutions, which oblige no man to avow his belief. (*y*) Others of them, however, assign as the reason "that the witness

(*t*) *Introd.* pt. 1, § 12.

(*v*) *Ph. & Am. Ev.* 12, *Rosc. Crim.*

(*u*) *Ph. & M. Ev.* 12; *Rosc. Crim.*

*Ev.* 127, 4th ed.

*Ev.* 127, 4th ed.; *The Queen's Case*, 2

(*x*) 3 *Christ. Blackst.* 369, note

B. & B. 284; *R. v. Taylor*, 1 *Peake*,

14.

11; *R. v. White*, 1 *Leach*, C. L. 430;

(*y*) 1 *Greenl. Ev.* § 370, note (2),

*R. v. Serva*, 2 *Car. & K.* 56; see also

7th ed.

1 & 2 *Vict. c.* 105.

could not be permitted in court to explain or deny the declarations imputed to him, because it would be incongruous to admit a man to his oath, for the purpose of ascertaining whether he had the necessary qualifications to be sworn." (z) But surely these views are extreme. On the one hand, if a witness may be questioned as to his religious opinions, it can only be on the assumption that a knowledge of them would in some way assist the tribunal; in which case they become facts in issue, and any legitimate evidence affecting them ought to be received. Very strong proof would doubtless be required to induce a court to disbelieve the answers of a witness on these subjects;—for the question is not what his religious opinions have been at any former period, but what they are at the moment when he is standing in the box. On the other hand, it is an abuse of the great principles of civil and religious liberty, to object to such an examination as inquisitorial. The object of it is, not to pry into the speculative views of the witness, but to enable the tribunal to estimate his trustworthiness—in accordance with which it is fully established, that he cannot be questioned as to any particular religious opinion, or even whether he believes in the Old or New Testament. No question can be asked, beyond whether he believes in a God, the avenger of falsehood, and will designate a mode of swearing binding on his conscience; (a) and if he complies with these, he cannot be asked whether he considers any other mode more binding, for such a question is unnecessary and irrelevant. (b) And we apprehend that although these questions may be put,

(z) Appleton on Evid. pp. 26, 37.

(b) So held by the judges in The

(a) See the authorities cited *supra*, Queen's Case, 2 B. & B. 284.  
 §§ 134 et seq.

a witness, if he be an atheist or a theist, is not bound to answer; for by so doing he exposes himself to an indictment under the 9 & 10 Will. 3, c. 32, and perhaps also at common law; and it is an established principle that no man is bound to criminate himself. (c)

162. The ordinary form of swearing in English courts of common law is well known. The witness, holding the New Testament (d) in his bare right hand, is addressed by the officer of the court in a form which varies according to the nature of the proceedings.

In criminal cases, when the accused is in custody, it runs thus :

“The evidence that you shall give to the court and jury, sworn between our sovereign lady the Queen, and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth : So help you God.”

When the accused is not in custody the form is the same, except that he is then described as “the defendant.”

In civil cases it is—

“The evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth : So help you God.”

The witness then kisses the book.

But there can be little doubt that if a witness allows himself to be sworn in either of these forms, or perhaps in any other form, without objecting, he is liable to be indicted for perjury if his testimony prove false. (e)

(c) *Supra*, ch. 1, §§ 126 et seq.

(d) Strictly speaking, this should be the four Evangelists; but the

distinction is disregarded in practice.

(e) *Sells v. Hoare*, 3 B. & B. 232; 1 & 2 Vict. c. 105.

163. Numerous instances are to be found in our books, of the application of the principle, that witnesses are to be sworn in that form which they consider binding on their consciences. Members of the Kirk of Scotland, (*f*) and others, (*g*) who object to kissing or touching the book, have been sworn by lifting up the hand while it lay open before them. In Ireland Roman Catholics are (or at least were), sworn on a New Testament with a cross delineated on the cover. (*h*) Jews are sworn on the Pentateuch, keeping on their hats, the language of the oath being changed from "So help you God," to "So help you Jehovah." Mohammedans are sworn on the Koran, and the ceremony adopted in *R. v. Morgan* (*i*) is thus described. The book was produced. The witness first placed his right hand flat upon it, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head, he then looked for some time upon it; and on being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. In a recent case a different course was followed. The officer of the court asked the witness what form of oath he deemed binding on his conscience, who replied, the oath in the usual words, provided he were sworn on the Koran; and he was sworn accordingly. In another case a similar question was put to a Parsee witness, who was sworn in the same manner, except that instead of the Koran he was sworn on a book which he brought with him. (*k*) According to the report of *Omychund v.*

(*f*) *Mee v. Reid*, 1 Peake, 23.

(*i*) 1 Leach, C. L. 54.

(*g*) *Colt v. Dutton*, 2 Sid. 6; *Mil-drone's Case*, 1 Leach, C. L. 412; *Walker's Case*, Id. 498.

(*h*) *McNally*, Ev. 97.

(*k*) These statements were made on the authority of the late Mr. Coleman, senior clerk to the late L. C. B. Pollock.

Barker, (*l*) part of the ceremony of swearing a Hindoo consists in his touching the foot of a Brahmin, or, if the party swearing be himself a priest, then he touches the Brahmin's hand ; but if this is deemed by their religion essential to the validity of an oath, it is obvious that Hindoos cannot be sworn in countries where no Brahmins are to be found. This, however, appears not to be their only form of swearing ; (*m*) and we understand that, at least in some parts of India, the natives are sworn on a portion of the water of the Ganges. A Chinese witness has been sworn thus. (*n*) On getting into the witness-box he knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The officer then administered the oath in these words, which were translated by the interpreter into the Chinese language: " You shall tell the truth and the whole truth ; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer." (*o*)

**164.** Whether this deference to the conscience of witnesses, would be carried so far as to allow a form of oath involving rites which our usages would pronounce improper or indecent ; as, for instance, the sacrifice of an animal, which was often resorted to in ancient, and occasionally even in modern, times ; (*p*) or the swearer placing his hand under the thigh of

(*l*) 1 Atk. 21.

(*m*) Goodeve, Evid. 76, 77 ; 1 Str. Hindù Law, 311.

(*n*) R. v. Entrehman, Car. & M. 248. See also Peake, Ev. 141, note (f), 5th ed.

(*o*) According to a newspaper report, this form was followed at the Middlesex Sessions, April 2, 1855, in a case of R. v. Sichoo, with the addition that the saucer was filled with salt.

(*p*) See Genes. xv. 9 et seq. ; Gro-tius de Jur. Bell. ac Pac. lib. 2, c. 13, § 10 ; Liv. lib. 1, c. 24. It is said that in the island of Hong Kong, even since it came into the possession of the British, part of the ceremony of swearing a Chinese witness consisted in cutting off the head of a live cock or live fowl. Berncastle's Voyage to China, vol. 2, p. 39.

the person by whom the oath is administered, as was the custom of patriarchal times; (*q*) has not been settled by authority. The great question in all such cases would be, whether the ceremony suggested was *malum in se*, and the scruples of the witness against being sworn in any other way were expressed *bona fide*; or whether they were affected merely with the view of evading the obligation of an oath, or turning the administration of justice into ridicule.

**165.** Atheism, and other forms of infidelity which deny all exercise of Divine power in rewarding truth and punishing falsehood, remained untouched by *Omychund v. Barker* and the above decisions, and continued to be recognized as grounds of incompetency. (*r*) But it was gravely questioned whether this state of the law ought to be maintained, at least so far as casual evidence was concerned? Was it wise to leave it in the power of every man whose breast was the repository, perhaps the sole repository, of evidence affecting the lives and fortunes of his fellow-citizens, to stifle that evidence by pretending to hold erroneous views on the subject of religion? And even supposing the atheism, epicureanism, &c., to be ever so unfeigned and genuine, was it not more properly an objection to the credit than to the competency of the witness?—for it amounted simply to this, that out of four sanctions of truth one had no influence on his mind. (*s*) The only case, as had been well observed, in which “Cacothicism,” or bad religion was a legitimate ground for the exclusion of testimony, was where a man belonged to a religion the

(*q*) Genesis, ch. xxiv. ver. 2; ch. xlvii. ver. 29.

(*s*) 5 Benth. Jud. Ev. 125, 126. See also Introd. pt. I, §§ 16 et seq., and

(*r*) See *Maden v. Catanach*, 7 H. & N. 360. pt. 2, § 55.



god of which ordained perjury; (*t*) and the fanatic whose creed allowed mendacity in private and false swearing in public, (*u*), was more dangerous in the witness-box than any form of infidel that could present himself. Even Atheism, as was justly remarked by Lord Bacon, (*x*) "leaves a man to sense,

(*t*) See Benth. Jud. Ev. bk. 9, pt. 3, ch. 5, s. 2.

(*u*) "Of all the religious codes known, the Hindoo is the only one by which, in the very text of it, if correctly reported, a license is in any instance expressly given to false testimony, delivered on a judicial occasion, or for a judicial purpose. . . . Cases, some extrajudicial, some judicial, and upon the whole in considerable variety and to no inconsiderable extent, are specified, in which falsehood, false witness, false testimony, are expressly declared to be allowable. 1. False testimony of an exculpatory tendency, in behalf of a person accused of any offense punishable with death. Three cases, however, are excepted, viz.: 1. Where the offense consists in the murder of a Brahmin; or 2 (what comes to the same thing), a cow; or 3. In the drinking of wine, the offender being, in this latter case, of the Brahmin caste. . . . In the representation of the other cases, scarce a word could be varied without danger of misrepresentation; word for word they stand as follows: 'If a marriage for any person may be obtained by false witness, such falsehood may be told; as upon the day of celebrating the marriage, if on that day the marriage is liable to be incomplete, for want of giving certain articles, at that time, if three or four falsehoods be asserted, it does not signify; or if, on the day of marriage a man promises to give his daughter many ornaments, and is not able to give them, such falsehoods as

these, if told to promote a marriage, are allowable. If a man, by the impulse of lust, tells lies to a woman, or if his own life would otherwise be lost, or all the goods of his house spoiled, or if it is for the benefit of a Brahmin, in such affairs, falsehood is allowable'" (Benth. Jud. Ev. vol. i. pp. 235, 236. See also vol. v. p. 134). We have verified his reference for these extraordinary statements. The above passages will be found in the translation of Pootee, ch. 3, s. 9, in Halhed's Code of Gentoo Laws. See further on this subject, Goodeve, Evid. 114, 115; and the Ordinances of Menu, ch. 8, § 112, translated by Sir William Jones. The lower orders of Irish, although timorous of taking even true oaths in general, commonly consider perjury to save a criminal from capital punishment either as no crime at all, or at most a peccadillo. To these instances may be added the principle laid down by Mascardus, relative to confessions to clergymen, who, not satisfied with contending that such confessions ought to be inviolable, goes on to say that, if the priest be examined as a witness to prove what was stated to him in confession, "potest dicere se nihil scire, ex eo quod illud, quod scit, scit ut Deus, et ut Deus non producitur in testem, sed ut homo, et tanquam homo ignorat illud, super quo producitur." Mascardus, de Prob. Quæst. 5, NN 50. 51; 1 Greenl. Ev. § 247, 714 ed

(*x*) Bacon's Essay on Superstition.

to philosophy, to natural piety, to laws, to reputation; all which may be guides to an outward moral virtue, though religion were not; but superstition dismounts all these, and erecteth an absolute monarchy in the minds of men." And, whatever might have been urged formerly in favor of the exclusion in question it seemed inconsistent to retain it at the present day; since the 6 & 7 Vict. c. 22 had allowed the reception, in the British colonies, of the unsworn testimony of the members of certain barbarous and uncivilized races, who are described in that statute (whether truly or not is immaterial to our present purpose), as "destitute of the knowledge of God and of any religious belief." A similar change in the law on this subject, had been effected by the recent legislation, of some of the United States of America, whereby the want of religious belief was treated as an objection to the credit not to the competency of a witness. (*y*) And, as we shall see presently, our own legislature has at length adopted these views. (*z*)

166. The third ground remains to be noticed, namely, the refusal by the person called as a witness to comply with religious forms,—in other words, to guarantee the truth of his testimony by the sanction of an oath in any shape. A perverse refusal to be sworn was treated as a contempt of court; but great difficulty had arisen in modern times, from the circumstance that several sects of Christians, and individual members of other sects, entertained conscientious objections to the use of oaths; relying on the command in the New Testament, "Swear not at all." (*a*)

(*y*) Appleton, Evid. App. 272, 277, 278.

(*z*) See 32 & 33 Vict. c. 68, s. 4.

(*a*) Matt. v. 34. In the original "*μη ὀμόσαι ὅλως*," in the Vul-

gate "*non jurare omninò*;" and the prohibition is repeated James v. 12. Most Christians consider that these words are only to be understood with reference to profane, rash, and perhaps

In some instances the legislature, satisfied that these scruples were bona fide, judiciously gave way to them and interposed for the relief of the parties, by substituting for an oath a solemn affirmation or declaration, rendering, however, a false affirmation or declaration

evasive swearing, and were not at all intended to prohibit oaths taken according to the teaching of the Old Testament, "in truth, in judgment, and in righteousness" (Jerem. iv. 2). The discourse contained in Matt. v., commonly called the Sermon on the Mount, of which the above passage forms part, is directed generally against abuses and evasions of the moral law; all intention of revoking any part of which is expressly disclaimed (Ver. 17). Thus with respect to the subject in question: the Jews were commanded to swear by the name of God (Deut. vi. 13), and were told that they must not forswear themselves (Lev. xix. 12). Now, the Sermon on the Mount does not abrogate this, but, on the contrary, proceeds to show that swearing by created things is in effect swearing by the creator of them. Matt. v. ver. 33 et seq., "Ye have heard that it hath been said by them" (qu. to them? "*ἐρρέθη τοῖς ἀρχαίοις*,") "of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all: neither by heaven; for it is God's throne; nor by the earth; for it is his footstool; neither by Jerusalem; for it is the city of the great king. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil." This seems confirmed by a subsequent passage of the same gospel (Matt. xxiii. 16 et seq.), where our Lord addresses the Scribes and Phari-

sees thus: "Woe unto you, ye blind guides, which say, Whosoever shall swear by the temple, it is nothing; but whosoever shall swear by the gold of the temple, he is a debtor. Ye fools and blind: for whether is greater, the gold, or the temple that sanctifieth the gold? And, whosoever shall swear by the altar, it is nothing; but whosoever sweareth by the gift that is upon it, he is guilty. Ye fools, and blind: for whether is greater, the gift, or the altar that sanctifieth the gift? Whoso therefore shall swear by the altar, sweareth by it and by all things thereon. And whoso shall swear by the temple, sweareth by it, and by him that dwelleth therein. And he that shall swear by heaven, sweareth by the throne of God, and by him that sitteth thereon." One thing, however, is certain, that if the words "Swear not at all" are to be understood as an absolute prohibition of calling God to witness under any circumstances, the Apostle Paul has most unequivocally violated this command in several of his epistles; as, for instance: "Now the things which I write unto you, behold, before God, I lie not" (Gal. i. 20). "God is my witness, whom I serve, &c." (Rom. i. 9). "I call God for a record upon my soul (2 Cor. i. 23; see also 2 Cor. xi. 31; 1 Thess. ii. 5; Philip. i. 8). In the Epistle to the Hebrews (vi. 16, 17) also he says, "For men verily swear by the greater and an oath for confirmation is to them an end of all strife," and refers to the oath taken by God himself to Abraham. Ver. 13-17.

punishable as perjury. The statutes on 'this subject extended to Quakers, (b) Moravians, (c), and Separatists; (d) as also to persons who had been Quakers or Moravians, but, having ceased to be such, still continued to object conscientiously to taking oaths. (e) The difference in the forms of affirmation given by these statutes is singular. In the case of Quakers and Moravians it runs thus :

" I A. B. being one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians as the case may be] do solemnly, sincerely, and truly declare and affirm," &c.

With the Separatists it is :

" I A. B. do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare, that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect ; and I do also in the same solemn manner affirm and declare," &c.

In the two remaining cases the form is :

" I A. B. having been one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians, as the case may be], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm."

Members of other Christian sects, the tenets of which recognized the lawfulness of oaths, were still compellable to be sworn in criminal cases ; but with respect to civil cases, it was enacted by the 17 & 18 Vict. c. 125, s. 20, that " if any person called as a wit-

(b) 3 & 4 Will. 4, c. 49.

(c) Id.

(d) 3 & 4 Will. 4, c. 82.

(e) 1 & 2 Vict. c. 77.

ness, &c. shall refuse, or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer, &c., upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, viz. :

“ ‘I. A. B. do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare,’ ” &c.

This enactment was extended to criminal cases by 24 & 25 Vict. c. 66.

Then came the 32 & 33 Vict. c. 68, s. 4, which applies to every “person called to give evidence in any court of justice, whether in a civil or criminal proceeding,” who “shall object to take an oath, or shall be objected to as incompetent to take an oath;” and which enacts, that “such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration :

“ ‘I solemnly promise and declare, that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.’ ”

And that “any person who, having made such promise and declaration, shall willfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath.”

And,—doubts having arisen as to the extent and meaning of the words “courts of justice,” and “presiding judge,” in the above statute,—it was, by the 33 & 34 Vict. c. 49, s. 1, enacted, that these words should “be deemed to include any person or persons having.

by law, authority to administer an oath for the taking of evidence."

**167. 3. Incompetency from interest.** The 6 & 7 Vict. c. 85, abolishing incompetency in witnesses on the ground of their interest in the matter in question, has been already referred to. (*g*) And although, by the operation of that and subsequent enactments, competency may now be looked on as the rule, and incompetency the exception, still it will be advisable to treat the whole subject of incompetency from interest, as it existed at the common law; and then to point out the extent to which it has been modified by statute.<sup>1</sup>

(*g*) *Supra*, § 143.

<sup>1</sup> And very many of the states have enacted statutes upon the subject. See, as to rules upon the subject in the United States courts, *Mumm v. Owens*, 2 Dill, 475; *Green v. United States*, 9 Wall. 655; *Hubbell's Case*, 4 Ct. of Cl. 37. And in *Alabama*—*Brand v. Abbott*, 42 Ala. 499; *O'Niel v. Reynolds*, Id. 197; *Thomas v. Thomas*, Id. 120; *Mobile v. Jones*, Id. 630.

*Arkansas*—*Giles v. Wright*, 26 Ark. 476.

*California*—*People v. McGunigill*, 41 Cal. 429.

*Georgia*—*Anderson v. Wilson*, 45 Ga. 25; *Hayden v. McKnight*, 49 Id. 147; *Latimer v. Sayre*, 45 Id. 468; *Veal v. Veal*, Id. 511; *Ouzts v. Seabrook*, 47 Id. 359; *Rust v. Shackelford*, Id. 538.

*Illinois*—*Mitchinson v. Cross*, 58 Ill. 366; *Jacquin v. Davidson*, 49 Id. 82; *Steumbaugh v. Hallam*, 48 Id. 305.

*Indiana*—*Bishop v. Welch*, 35 Ind. 521; *Noble v. Withers*, 36 Id. 193; *Peacock v. Albin*, 39 Id. 25; *Fitzgerald v. Cox*, Id. 84; *Hall v. State*, Id. 30.

*Iowa*—*Keech v. Cowles*, 34 Iowa, 259; *Reichart v. Buckingham*, Id. 409; *Schmid v. Kreismer*, 31 Id. 479.

*Kansas*—*State v. McCord*, 8 Kan. 232; *McKean v. Massey*, 9 Id. 600.

*Maine*—*Payne v. Gray*, 56 Me. 317; *State v. Cleaves*, 59 Id. 299; *Kelton v. Hill*, Id. 259; *Folsom v. Chapman*, Id. 194.

*Maryland*—*Jones v. Jones*, 36 Md. 447; *Downes v. Md.*, &c. R. R. Co. 37 Md. 100.

**168.** First, then, of the parties to the suit. "Nemo in propriâ causâ testis esse debet," (*h*) was the rule of the old law—a rule which applied equally to civil

(*h*) 1 Blackst. Com. 443; 3 Id. 371. 22, tit. 5, l. 10; Cod. lib. 4, tit. 20, See also Co. Litt. 6 b. It was the l. 10; Huberus, Præl. Jur. Civ. lib. 22, same in the civil law. See Dig. lib. tit. 5, u. 6.

*Massachusetts*—Brooks v. Tarbell, 103 Mass. 496.

*Michigan*—Goodrich v. Allen, 19 Mich. 250; Moulton v. Mason, 21 Id. 364.

*Minnesota*—State v. Die, 14 Minn. 35.

*Mississippi*—Witherspoon v. Blewlett, 47 Miss. 570; Reinhardt v. Evans, 48 Id. 230.

*Missouri*—Gavin v. Williams, 50 Mo. 201; Looker v. Davis, 47 Id. 140.

*New Hampshire*—Stearns v. Wright, 51 N. H. 600; Ballou v. Tilton, 52 Id. 605.

*New Jersey*—Walker v. Hill, 21 N. J. Eq. 191.

*New York*—Nourry v. Lord, 3 Abb. (N. Y.) App. Dec. 392; Hildebrand v. Crawford, 6 Lans. 502; Bralich v. People, 65 Barb. 48; Hatch v. Pengret, 64 Barb. 89; Hildreth v. Shepherd, 65 Id. 265; Livingston v. Keetch, 34 N. Y. Superior Ct. 547; Winston v. English, 14 Abb. Pr. N. S. 199; 44 How. Pr. 398, 498; Per contra, Morgan v. Whittaker, Id. 127; Thoule v. Ritter, 13 Abb. Pr. N. S. 489; Strong v. Dean, 55 Barb. 337; Carr v. Great Western Ins. Co. 3 Daly, 140.

*North Carolina*—Howerton v. Lattimer, 68 N. C. 370; Gilmer v. McVairy, 69 N. C. 335; State v. Bryant, Id. 444; Whitesides v. Green, 64 Id. 307; State v. Maxwell, Id. 313; Meroney v. Meroney, Id. 312; Isennour v. Isennour, 64 Id. 540; Brower v. Hughes, Id. 642.

*Ohio*—Hubbell v. Hubbell, 22 Ohio St. 208.

*Pennsylvania*—Williams v. Davis, 69 Pa. St. 21; McClelland v. West, 70 Id. 183; Cannell v. Crawford, 59 Id. 196.

*South Carolina*—Guery v. Kinsler, 3 S. C. 423.

*Vermont*—Walker v. Taylor, 43 Vt. 612; Streeter v. Evans, 44 Id. 27; Poquet v. North Hero, Id. 91; Morse v. Low, Id. 561; Re Foster, Id. 570; Batchelder v. Kinney, Id. 150.

*Wisconsin*—Potter v. Menasha, 30 Wis. 492; Cornell v. Barnes, 26 Id. 473; First National Bank of Wood, Id. 500; Daniels v. Foster, Id. 686.

In the courts of the United States a defendant in a criminal case cannot testify in his own behalf, although by statute his testimony is admissible in the courts of the state (United

and to criminal proceedings ; (i) and which, according to the best authorities, was founded solely on the interest which the parties to the suit were supposed to

(i) *R. v. Payne*, L. Rep. 1 C. C. 349. is not a competent witness for the So, where two prisoners are indicted other. *R. v. Thompson*, L. Rep. 1 C. and tried together, the wife of the one C. 377.

*States v. Hawthorne*, 1 Dill, 422). An act allowing a party or person interested to testify is not an *ex post facto* law, but operates only as a removal of a present disability, and does not affect any vested right, or impair the obligation of any contract. *Wathall v. Wathall*, 42 Ala. 450.

The statutes of various states allowing defendants in criminal proceedings to be sworn in their own behalf, contain a proviso that a refusal to testify in their own behalf shall not be deemed to be a presumption against the accused. This proviso, however, is criticised by Judge Appleton, in *State v. Cleaves*, 59 Me. 298, as follows :

“ The defendant, a married woman, was indicted for being a common seller of intoxicating liquors. The presiding justice instructed the jury, ‘ that the fact that the defendant did not go upon the stand to testify, was a proper matter to be taken into consideration by them in determining the question of her guilt or innocence.’ To this instruction exceptions were seasonably taken. The statute authorizing the defendant in criminal proceedings, at his own request, to testify, was passed for the benefit of the innocent, and for the protection of innocence. The defendant in criminal cases is either innocent or guilty. If innocent, he has every inducement to state the facts which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance. Being guilty, if a witness, a statement of the truth would lead to his conviction, and justice would ensue. Being guilty, and denying his guilt as a witness, an additional crime would be committed, and the peril of a conviction for a new offense incurred. But the defendant, having the opportunity to contradict or explain the inculpatory facts proved against him, may decline to avail himself of the privilege of testifying, is an existent and obvious fact. It is a fact patent in a case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused. All the analogies of the law are in favor of their regarding this as an evidentiary fact. All the acts of a



have in the event of it. (k) Consequently, when it appeared that they had none, or that any which they ever had, had been removed, their evidence was re-

(k) *Gillb. Ev.* 130, 4th ed.; *Ph. & Bingham*, 395; *Pipe v. Steel*, 2 Q. B. *Am. Ev.* 47; *Worrall & Jones*, 7 733.

party accused, whatever explains or throws light upon those acts, all the acts of others, relative to the crime charged, that come to his knowledge, and which may influence him; his loves and his hates, his promises, his threats, the truth of his discovery, the falsehood of his apologies, pretenses, and explanations; his looks, his speech, his silence when called upon to speak; everything which tends to establish the connection between the accused and the crime with which he is charged; every circumstance preceding, accompanying, or following, may become articles of circumstantial evidence of no slight importance. A statement is made either to a man, or within his hearing, that he was concerned in the commission of a crime, to which he returns no reply—the natural inference is, that the imputation is well founded, or he would have repelled it. ‘Silence is tantamount to confession’ (*Best on Presumptions*, § 241). Extrajudicial non-responsion, when a charge is made, is always regarded as an article of circumstantial evidence, the probative effect of which may be weakened by various affirmative considerations which it is not now necessary to discuss, but which are to be considered and weighed by the jury.

“When the prisoner is on trial, and the evidence offered by the government tends to establish his guilt, and he declines to contradict or explain the inculpatory facts which have been proved against him, is not that a fact ominous of criminality? Is his silence of any the less probative force, when thus in court called upon to contradict or explain by the pressure of criminative facts, fully proved, than his extrajudicial silence when a charge is made to him, or in his presence? The silence of the accused, the omission to explain or contradict, when the evidence tends to establish guilt, is a fact the probative effect of which may vary according to the varying conditions of the different trials in which it may occur; which the jury must perceive, and which perceiving, they can no more disregard than one can the light of the sun when shining with full blaze on the open eye. It has been urged that this view of law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the

ceivable : as, for instance, where one of several defendants suffered judgment by default ; or had a *nolle prosequi* entered against him, under circumstances which rendered him indifferent to the result of the contest between his companions and the plaintiff, &c. So if, in the course of the trial, it appeared to the court that there was no evidence against some or one of several defendants, it would, in its discretion, direct a verdict to be taken for him or them, before the others were called on for their defense ; ( *l* ) because, otherwise, a prosecutor or plaintiff might in many cases have obtained an unjust verdict, merely by making defendants of all the witnesses who could give evidence in favor of that defendant who was his real adversary. ( *m* ) And a like practice was followed, where the evidence of a person whose name appeared on the record as defendant, was required by the plaintiff or the crown. ( *n* )

( *l* ) *Creswick's Case*, Clayt. 37, pl. 64 ; *Anon.*, 1 Mod. 11, pl. 34 ; *White v. Hill*, 6 Q. B. 487 ; *Wakeman v. Lindsey*, 14 Q. B. 625 ; and the authorities in the next note.

( *m* ) 12 Ass. pl. 11 & 12 ; *Dymoke's Case*, Sav. 34, pl. 81 ; *Neilau v. Hanny*, 2 Car. & K. 710.

( *n* ) It appears that, where two prisoners are indicted together, but are not given in charge to the same jury, the one is admissible as a witness against the other, although no verdict has been taken either for or against the former. But the better course is, before admitting the prisoner to give

result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation, it is his fault, if by his own misconduct or crime he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from testimony, if truly delivered.

"The instruction given was correct, and in entire accordance with the conclusions to which, after mature deliberation, we have arrived." And see *State v. Bartlett*, 55 Me. 200 ; *State v. Lawrence*, 57 Id. 575.

**169.** There were several common-law exceptions to this part of the rule in question. The first which we shall notice was perhaps more apparent than real, viz. that the prosecutor of an indictment or information is in general a competent witness against the accused. (*p*) The reason of this is, that in contemplation of law the suit is the suit of the crown, instituted not to redress the injury done to the person by whom the law is set in motion, but to punish the offender for disturbing the peace of the sovereign and the good order of society. And hence the appellor in an appeal of felony, while that mode of proceeding was in use, was not a competent witness against the appellee; for the suit was his own. (*q*) The prosecutor of an indictment, &c. has not in general any direct pecuniary interest in the result; for although under certain statutes he may be awarded his costs, yet this is discretionary with the judge, and does not flow as a necessary consequence from a verdict of conviction. "But," as is observed in a text book published before the passing of the 6 & 7 Vict. c. 85, (*r*) "although in general, a prosecutor or party aggrieved has no interest in the event of a prosecution, and is therefore a competent witness, there are several classes of cases in which, by virtue of some legislative enactment, he is entitled to a particular benefit or advantage, upon obtaining a conviction of the party accused. In these cases, where the benefit or advantage will immediately result to the witness on a conviction being obtained, the witness will be interested, and he will be incompetent, unless the general rule of law be dispensed with

evidence, either to enter a verdict of "not guilty," or to take a plea of "guilty," and pass sentence upon him. Winsor v. R. (in error), 6 B. & S.

143.

(*p*) "A doner evidence, chescun serra admitte pur le roy." Staundf P. C. lib. 3, c. 8, 163, a.

(*q*) 2 Hale, P. C. 231, 232.

(*r*) Ph. & Am. Ev. 66.

in the particular case, either by some legislative enactment, or some principle of public policy requiring that his evidence shall be received." The most important instance of this latter exception, is in the case of prosecutions for robbery or theft; where the party injured was competent, notwithstanding he became entitled to a restitution of his property, immediately upon obtaining a conviction of the offender. (s)

170. A striking exception to the common-law rule, which excluded the evidence of parties interested in the event of a suit, or question at issue, is to be found in the old system of allowing persons indicted for treason or felony to become approvers, which has been replaced by the modern practice of receiving the evidence of accomplices—the "*socii vel auxiliares criminis*" of the civilians. The necessity for admitting this kind of evidence has been recognized by the laws of all countries, and the practice is of extreme antiquity in our own. (t) The reasons for it were thus explained by a very able judge, on an important occasion: (u) "If it should ever be laid down as a practical rule in the administration of justice, that the testimony of accomplices should be rejected as incredible, the most mischievous consequences must necessarily ensue; because it must not only happen that many heinous crimes and offenses will pass unpunished, but great encouragement will be given to bad men, by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt, and thereby universal confidence will be substituted for that distrust of each other which

(s) Ph. & Am. Ev. 67.

(t) Approvers are mentioned in the ancient treatise entitled "*Dialogus de Scaccario*," p. 426. See also 12 Edw. IV. 10 B. pl. 26; 2 Hen. VII. 3 A. pl. 8.

(u) L. C. Abbott's Charge to the Grand Jury on the Special Commission, in March, 1820; 33 Ho. St. Tr. 689.

actually possesses men engaged in wicked purposes and which operates as one of the most effectual restraints against the commission of those crimes to which the concurrence of several persons is required. No such rule is laid down by the law of England or of any other country." At first sight it might seem that, previous to the 6 & 7 Vict. c. 85, the objection to the testimony of such persons would have been properly ranged under infamy of character: but as objections of that nature could only be supported by proof of a conviction for an offense, and judgment of the court thereon, (x) it followed that a confession by a witness of any conduct, however infamous, only went to his credit; so that the true ground of objection to the evidence of approvers or accomplices, arises from the obvious interest which they have, to save themselves from punishment by the conviction of the accused against whom they appear. The old law of approvement, and the modern practice of admitting the evidence of accomplices, are thus fully and clearly stated by Lord Mansfield in *R. v. Rudd*. (y) "The law of approvement, in analogy to which this other practice" (*i. e.* of receiving the evidence of accomplices), "has been adopted and so modelled as to be received with more latitude, is still in force, and is very material. A person desiring to be an approver, must be one indicted of the offense, and in custody on that indictment: he must confess himself guilty of the offense, and desire to accuse his accomplices; he must likewise upon oath discover, not only the particular offense for which he is indicted, but all treasons and felonies which he knows of; and after all this, it is in the discretion of the court, whether they will

(x) *Supra*, § 142.(y) *Cowp.* 331, 335

assign him a coroner, and admit him to be an approver or not: for if, on his confession, it appears that he is a principal and tempted the others, the court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true; and that he has discovered the whole truth. For this purpose the coroner puts his appeal into form; and when the prisoner returns into court, he must repeat his appeal, without any help from the court, or from any bystander. And the law is so nice, that if he vary in a single circumstance, the whole falls to the ground, and he is condemned to be hanged; if he fail in the color of a horse, or in circumstances of time, so rigorous is the law, that he is condemned to be hanged; much more, if he fail in essentials. The same consequences follow if he does not discover the whole truth; and in all these cases the approver is convicted on his own confession. See this doctrine more at large in Hale's Pleas of the crown, vol. 2, p. 226 to 236; Staund. Pl. Crown, lib. 2, c. 52 to c. 58; 3 Inst. 129.—A further rigorous circumstance is, that it is necessary to the approver's own safety, that the jury should believe him; for if the partners in his crime are not convicted, the approver himself is executed. Great inconvenience arose out of this practice of approvement. No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders, that accomplices should be received as witnesses, the practice is liable to many objections. And though under this practice they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with the jury to convict the offenders; it being so strong a temptation to a man to commit perjury, if by accusing another

he can escape himself.<sup>1</sup> Let us see what has come in the room of this practice of approvement. A kind of hope, that accomplices who behave fairly and disclose the whole truth, and bring others to justice, should themselves escape punishment and be pardoned. This is in the nature of a recommendation to mercy. . . . The accomplice is not assured of his pardon; but gives his evidence in vinculis, in custody; and it depends on the title he has from his behavior, whether he shall be pardoned or executed."

171. But although in strictness a jury may legally (except where two witnesses are required by law) convict on the unsupported evidence of an accomplice or socius criminis; (z) yet it is a rule of general and usual practice,—now so generally followed as almost to have the force of law,—for the judge to advise the jury, not to convict on the evidence of an accomplice alone. (a) It is not, however, every participation in a crime, which will render a party an accomplice in it, so as to require his evidence to be confirmed; (b) and the nature of the confirmation in

(z) See the authorities collected *supra*, § 139, note (n). For the practice of the civil law on this subject, see Mascard, de Prob. Concl. 158.

(a) Per Wightman, J., *R. v. Boyes*, 1 B. & S. 311, 320.

(b) *R. v. Hargrave*, 5 Car. & P. 170; *R. v. Jarvis*, 2 Moo. & R. 40.

<sup>1</sup> The general rule in reference to the testimony of accomplices, is to advise the jury not to convict, unless the testimony is corroborated. But this is only a rule of practice and not a rule of law. The jury are the final judges of the credibility of the witness, and it is not error for a judge to refuse to charge a jury that they should refuse to convict without corroboration. *State v. Potter*, 42 Vt. 495; but see *United States v. Harries*, 2 Bond, 311., which holds somewhat differently as to the duty of a jury. Also *United States v. Smith*, 2 Bond, 323; *Id. v. one Distillery*, *Id.* 399; *Parsons v. State*, 43 Ga. 197; *Lee v. State*, 21 Ohio St. 151; *State v. Litchfield*, 58 Me. 267; *People v. Melvaine*, 39 Cal. 614; *People v. Ames*, *Id.* 407.

each case, must of course depend very considerably on its peculiar circumstances. But a few general principles may be stated. First, then, it is not necessary that the story told by the accomplice, should be corroborated in every circumstance he details in evidence; for, if this were so, the calling him as a witness might be dispensed with altogether. (*c*) Again, notwithstanding some old cases to the contrary, it seems now settled that the corroboration should not be merely as to the corpus delicti, but should go to some circumstances affecting the identity of the accused as participating in the transaction. (*d*) "A man," says Lord Abinger, "who has been guilty of a crime himself, will always be able to relate the facts of the case; and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all." (*e*) It is thought that confirmatory evidence by the wife of an accomplice will not suffice, for they must for this purpose be considered as one person. (*f*) Neither ought the jury to be satisfied, merely with the evidence of several accomplices who corroborate each other. (*g*)

172. When an issue was directed from the Court of Chancery, to be tried in a court of law, it was frequently made part of the order, that the plaintiff or defendant should be examined as a witness.

So when a cause was referred to arbitration from a court of law, it was usually part of the rule, that

(*c*) 31 Ho. St. Tr. 980.

(*d*) *R. v. Farler*, 8 C. & P. 106; *R. v. Addis*, 6 C. & P. 388; *R. v. Webb*, Id. 595; *R. v. Wilkes*, 7 C. & P. 272; *R. v. Moores*, Id. 270; *R. v. Dyke*, 8 C. & P. 261; *R. v. Stubbs*, 1 Dears. C. C. 555.

(*e*) *R. v. Farler*, 8 C. & P. 108.

Similar language was used by Parke, B., in *R. v. Parker*, Kent, Sp. Ass. 1851, MS.

(*f*) *R. v. Neal*, 7 C. & P. 168.

(*g*) 31 Ho. St. Tr. 1122-3; *R. v. Noakes*, 5 C. & P. 326; *R. v. Magill*, Ir. Circ. Rep. 418.



the arbitrator should be at liberty to examine the parties.

**173.** The first general statutory exception to the rule against admitting parties to the suit as witnesses, was contained in the 9 & 10 Vict. c. 95. That statute, after remodelling the County Courts, and extending their jurisdiction, enacts in its 83rd section, that "On the hearing or trial of any action, or on any other proceeding under this act, the parties thereto, their wives, and all other persons, may be examined, either on behalf of the plaintiff or defendant, upon oath, or solemn affirmation in those cases in which persons are by law allowed to make affirmation instead of taking an oath to be administered by the proper officer of the court." But this must not be looked on as an innovation introduced for the first time; for the old Courts of Conscience and Courts of Requests acts contained similar provisions.

**174.** Several other exceptions, to the rule excluding the evidence of parties to a suit or proceeding, were introduced by modern statutes, until the term, "Incompetency of Parties" was almost abolished by the 14 & 15 Vict. c. 99. That statute, after in its first section repealing the proviso in the first section of the 6 & 7 Vict. c. 85, which retained the exclusion of the evidence of such parties, enacted as follows:

Sect. 2. "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compel

lable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.”

Sect. 3. “ But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offense, or any offense punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, &c.”

Sect. 4. “ Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery; or to any action for breach of promise of marriage.” (*h*)

The 5th sect. provided that nothing in the act contained should repeal any provision in the Wills Act, 7 Will. 4 & 1 Vict. c. 36.

**175.** The other persons affected by this rule of exclusion, were the husbands and wives of the parties to the suit or proceeding. Husband and wife, say our books, “ *sunt duæ animæ in carne unâ* ”; (*i*) they “ are considered as one and the same person in law, and to have the same affections and interests; from whence it has been established as a general rule, that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and

(*h*) Repealed by the 32 & 33 Vict. c. 68, s. 1. See *infra*, § 18c

(*i*) Co. Litt. 6 b. See also Litt. sect. 291; Co. Litt. 112 a, and 123 a

the extreme hardship of the case." (*k*) This rule was not limited to protecting from disclosure, matters communicated in nuptial confidence, or facts the knowledge of which had been acquired in consequence of the relation of husband and wife; but was an absolute prohibition of the testimony of the witness to any facts affecting the husband or wife, as the case might be, however the knowledge of those facts might have been acquired. But the rule only applied, where the husband or wife was party to the suit or proceeding, in which the other was called as a witness, and did not extend to collateral proceedings between third parties. In such cases, husband and wife might be examined as witnesses, although the testimony of the one tended to confirm or contradict that of the other. (*l*) And the declarations of a wife, acting as the lawfully constituted agent of her husband, were admissible against him, like the declarations of any other lawfully constituted agent. (*m*)

176. To this branch also common-law exceptions are not wanting. Where one of the married parties used or threatened personal violence to the other, the law would not allow the supposed unity of person in husband and wife, to supersede the more important principle, that the state is bound to protect the lives and limbs of its citizens. (*n*) Thus, on an indictment against a man for assault and battery of his wife, or vice versâ, the injured party is a competent witness: (*o*) and husband and wife may swear the peace against

(*k*) Bac. Ab. Evidence, A. 1. See also 2 Hawk. P. C. c. 46, sect. 16; Davis v. Dinwoody, 4 T. R. 678; Hawkesworth v. Showler, 12 M. & W. 45; O'Connor v. Majoribanks, 4 M. & Gr. 435; Barbat v. Allen, 7 Exch. 609.

(*l*) 1 Phill. Ev. 72, 10th ed.; Tayl. Ev. 1235 4th ed.

(*m*) 1 Phill. Ev. 78 et seq., 10th ed.

(*n*) 2 Hawk. P. C. c. 46, s. 16; Peake's Ev. 173, 5th ed.; 1 East, P. C. 455; B. N. P. 287; 1 Phill. Ev. 80, 10th ed.

(*o*) B. N. P. 287; R. v. Azire, 1 Str. 633.

each other. (*p*)<sup>1</sup> So a husband may be principal in the second degree to a rape on his wife, and she is a competent witness against him; (*q*) but principal in the first degree he cannot be, for obvious reasons. (*r*) So if a husband commits an unnatural offense with his wife, she is a competent witness against him. (*s*) The case of abduction also falls within this exception. On indictments under the repealed stat. 3 Hen. 7, c. 2, for forcibly taking away a woman, the female, though married to the offending party, was a competent witness against him; the reasons assigned for which by Mr. Justice Blackstone (*t*) are, that "in this case she can with no propriety be reckoned his wife, because a main ingredient, her consent, was wanting to the contract; and also there is another maxim of law, that no man shall take advantage of his own wrong, which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness, to that very fact." This statute was replaced by the 9 Geo. 4, c. 31, s. 19, which was in its turn repealed by 24 & 25 Vict. c. 95; and its provisions were re-enacted, with a few alterations, by 24 & 25 Vict. c. 100,—sect. 53 of which is as follows: "Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such

(*p*) Anon., 12 Mod. 454; B. N. P. 287.

(*q*) 1 Phill. Ev. 80, 10th ed.; 2 Hawk. P. C. c. 46, s. 16; Lord Audley's Case, 3 Ho. St. Tr. 402, 413; Hutt. 115, 116.

(*r*) 1 Hale, P. C. 629.

(*s*) R. v. Jellyman, 8 C. & P. 604.

(*t*) 1 Blackst. Comm. 443. See Swendsen's Case, 14 Ho. St. Tr. 559, 575; and per Abbott, C. J., in R. v. Serjeant, Ry. & Mo. 352.

<sup>1</sup> See cases cited *ante*, note 1, p. 188.

interest, whoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, &c." And by sect. 54, "whosoever shall, by force, take away or detain against her will any woman of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, &c." The female so taken away is a competent witness on an indictment under these statutes; and it is said that she is so, notwithstanding her subsequent assent to the marriage, and voluntary cohabitation. (u)

**177.** The case of bigamy presents some difficulty. The first wife or husband, as the case may be, is not a competent witness against the accused; but our books say that the second wife or husband is, after proof of the first marriage; for that then the second marriage is a nullity; (x) and the practice is in accordance with this. The truth, however, seems to be, that the second wife ought to be received in these cases as a witness against the accused, at any stage of the trial, on the same grounds which render the testimony of the wife receivable on indictments for abduction, under the 3 Hen. 7, c. 2, 9 Geo. 4, c. 31, and 24 & 25

(u) 1 Ph. Ev. 83, 10th ed.; Tayl. Evid. § 1236, 5th ed.

(x) Tayl. Evid. § 1231 5th ed.; Rosc. Crim. Ev. 142, 4th ed.

Vict. c. 100. (*y*) It is an established principle that a woman is a competent witness against any one, even her lawful husband, who has done unauthorized violence, actual or constructive, to her person; and, besides, on a trial for bigamy, the objection to the competency of the injured female, on the ground that she is the wife of the accused, is a *petitio principii*. For, whether she is his lawful wife, or whether he has violated the law by pretending to make her such, is the very point at issue. How strange, then, does it seem that where, by a combination of falsehood, fraud, and sacrilege, a man obtains possession of a woman's person, property, and perhaps affection, her mouth is to be stopped against him because she is colorably his wife. This latter reasoning of course does not so strongly apply to rendering the second husband competent on a charge of bigamy brought against a female; but the first does, viz., that lawful marriage or wrongful marriage, in violation of the peace of the Queen, is a direct point in issue.<sup>1</sup>

178. What is the rule on this subject in cases of high treason, is a disputed point. Many eminent authorities lay down, that in such cases the testimony of married persons is receivable against each other, (*z*) on the ground of the great heinousness of the crime; and that the ties of allegiance to the sovereign, and the obligation of upholding social order are more binding than those arising out of the relation of husband and wife, and must in the eye of the law be considered paramount to any other obligations whatever. To this it may be added, that although marriage

(*y*) *Supra*, § 176.

(*z*) So said (not decided, for that was not the point in question) by the court, in *Mary Grigg's Case*, M. 12

Car. II., T. Raym. 1. To the same effect are Gilb. Ev. 133, 4th ed.; B. N. P. 286; 2 Ev. Poth. 311.

is an institution of natural law, and as such antecedent to all forms of government, and even to the organization of civil society, (*a*) the complete unity of person between husband and wife is a fiction, which the law disregards in cases where the ends of justice require it. (*b*) There is, however, high authority the other way; (*c*) and most of the modern text writers seem disposed to consider the evidence not receivable. (*d*) They argue that, as a woman is not bound to discover her husband's treason, (*e*) by parity of reasoning she cannot be a witness against him to prove it. But to this it may be answered, that one reason why the wife is not held responsible in such a case is, that she owes her husband a kind of allegiance, and may be supposed to be acting under his coercion—we are not aware that a husband would be excused from the guilt of misprision in concealing the treason of his wife. Under the old feudal law in this country, when the vassal took the oath of fealty to his lord, it was with the express saving of the faith which he owed to the king his sovereign lord; (*f*) probably on the principle stated by Lord Chief Baron Gilbert, that our "allegiance is founded on the benefit of our protection, which is to take place of our civil interests that relate only to well being." (*g*) But the question is an embarrassing one, on which the reader must form his own judgment.

**179.** The statutory exceptions to this rule are now extremely numerous.—So early as the 21 Jac. 1, c. 19, s. 6, the commissioners of bankruptcy were em-

(*a*) Pufendorf, De Jure Nat. & Gent. lib. 6, cap. 1. 72, 10th ed.; 1 Greenl. Ev. § 345, 7th ed.; Tayl. Ev. § 1237, 3th ed., &c.

(*b*) See *supra*, §§ 176, 177.

(*c*) 1 Hale, P. C. 301. See also 47; Trials per Pais, 371. See, however, 1 Hale, P. C. 48.

(*d*) Ph. & Am. Ev. 161; 1 Ph. Ev. 48. (*f*) Litt. sects. 85-89.

(*g*) Gilb. Ev. 134, 4th e

powered to examine upon oath the wife of any bankrupt, for the purpose of finding out and discovery of the estates, goods, and chattels of the bankrupt concealed, kept, or disposed of by her; and this provision has been re-enacted in substance, by "The bankruptcy act, 1869," the 32 & 33 Vict. c. 71, ss. 96, 97.

**180.** The clause in the county court act, 9 & 10 Vict. c. 95, which rendered the parties to suits competent witnesses in those courts, extended, as has been seen, to "their wives, and all other persons." (*h*) But in the superior courts, the subsequent statute 14 & 15 Vict. c. 99, while it removed the restriction on the parties themselves in almost all cases, (*i*) contained in its 3rd section an express clause, that nothing therein contained should "in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband"—language which gave rise to a doubt, whether husbands and wives were not thereby, by implication, rendered competent witnesses for and against each other in civil proceedings. This, after some conflict of opinion, was determined in the negative (*k*)—whether rightly or not is now immaterial to discuss; for by the 16 & 17 Vict. c. 83, s. 4, the proviso in the 6 & 7 Vict. c. 85, which continued the incompetency of the husbands and wives of the parties to a suit, &c., was repealed, and the following provisions were enacted:

Sect. 1. "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of

(*h*) *Supra*, § 173.

(*i*) *Supra*, § 174.

(*k*) *Stapleton v. Crofts*, 18 Q.

B. 367; *Barbat v. Allen*, 7 Exch.

609; *McNeillie v. Acton*, 17 Jurist.

661.



justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

Sect. 2. "Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery."

Sect. 3. "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

And now by the 32 & 33 Vict. c. 68, it is enacted as follows :

Sect. 1. "The fourth section of chapter ninety-nine of the statute passed in the fourteenth and fifteenth years of her present Majesty, and so much of the second section of 'The evidence amendment act, 1823,' as is contained in the words 'or in any proceeding instituted in consequence of adultery,' are hereby repealed."

Sect. 2. "The parties to any action for breach of promise of marriage shall be competent to give evidence in such action; provided always, that no plaintiff in any action for breach of promise of marriage

shall recover a verdict, unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

Sect. 3. "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question, tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."<sup>1</sup>

<sup>1</sup> The question as to the admissibility of the husband's testimony to the fact of his wife's adultery, in a civil suit brought by him for damages, against an alleged adulterer, has very recently met with exhaustive argument in the suit of Theodore Tilton v. Henry Ward Beecher: Brooklyn City Court, 1875 (See McDivitt's edition, vol. 1, p. 350 et seq.). Mr. Evarts, in arguing against Mr. Tilton's admissibility as a witness, cited the following American authorities: Greenl. on Evidence, 334, 345; 2 Kent Comm. 178; Hasbrouck v. Vandervoort, 9 N. Y. 153; People v. Mercein, 8 Paige, 50; King v. King, 2 Rob. Ev. 153; Stein v. Powman, 13 Pet. 209; Babcock v. Booth, 2 Hill, 181; Burrill v. Hull, 3 Sandf. Ch. 15. And as regards the New York statute of 1867, N. Y. Sess. Laws, 1867, p. 2221; Southwick v. Southwick, 49 N. Y. 510. Mr. Pryor, opposed, cited, for the admission of plaintiff's testimony, N. Y. Code of Procedure, § 399; 1 Greenl. on Evidence, § 342; Porter v. Marsh, 30 Barb. 506; 24 How. Pr. 610 (note); Wehrkampt v. Willett, 4 Abb. App. Dec. 548; 1 Keyes, 250; Barton v. Gledill, 12 Abb. O. S. 246; People v. Chamberlin, 23 N. Y. 85; Hooper v. Hooper, 43 Barb. 297; Hall v. Hall, 30 How. Pr. 59; White v. Stafford, 35 Barb. 419; Card v. Card, 39 N. Y. 317; Shirley v. Vail, 30 How. Pr. 407; Smith v. Smith, 15 How. 165; Mave-  
rick v. Eighth-Avenue R. R. Co., 36 N. Y. 378; Carpenter v. White, 46 Barb. 292; Babbott v. Thomas, 31 Id. 277; Schaffer v. Reuter, 37 Id. 44; Matteson v. New York Central R. R. Co., 62 Id. 364; 35 N. Y. 487; Shoemaker v. McKee, 19 How. 86; Dann v. Kingdom, 1 Thomp. & C. 492 (criticised); Petrie v

181. We have seen that the 14 & 15 Vict. c. 99, having by its second section removed the incompetency of parties in general, retained, by its third section, the incompetency of persons who, in any criminal proceeding, were charged with the commission of any indictable offense, or any offense punishable on summary conviction; and both that statute and the 16 & 17 Vict. c. 83, s. 2, expressly provided that, in criminal proceedings, husbands and wives should not be competent or compellable to give evidence for or against each other. (*l*) In this state of the law, arose the case of *The Attorney-General v. Radloff*, (*m*)—which was an information in the exchequer by

(*l*) *Supra*, § 180.

(*m*) 10 Exch. 84.

Howe, 4 Thomp. & C. 85; *Royal Insurance Co. v. Noble*, 5 Abb. Pr. N. S. 55; *State v. Briggs*, 9 R. I. 361; *State v. Wilson*, 2 Vroom (N. J.) And see Mr. Beach's argument, on p. 370 of McDivitt's edition of the trial; and the reply of Mr. Evarts, p. 378; citing *Taylor v. Jennings*, 7 Rob. 581; *Manchester v. Manchester*, 24 Vt. 649; *Bunnell v. Greathead*, 49 Barb. 109; besides numerous English authorities. Said Judge Neilson: "In determining the question raised by this objection, the court holds that the plaintiff is competent to be sworn, and to testify in his own behalf; that touching the principal question in issue, he is not competent to testify to any confidential communications." It is considered that this qualified direction respects the present state of our law of evidence, as the same has received legislative and judicial expression; and also respects what may remain of the rule which imposes silence or restraint by reason of the marital relation, and on grounds of public interest or policy. The New York statute, under which this decision was rendered, is as follows:

"An act to enable husband and wife, or either of them, to be a witness for or against the other, or on behalf of any party, in certain cases. Passed May 10, 1867.

"The people of the state of New York, represented in senate and assembly, do enact as follows:

"Section 1. In any trial or inquiry in any suit, action or

the attorney-general for an alleged violation of the revenue laws; and in which the question was raised, whether the defendant was rendered a competent witness by the 14 & 15 Vict. c. 99. Pollock, C. B., before whom the case was tried, held his evidence inadmissible; and, a verdict having been given for the crown, a rule was granted for a new trial, on the ground that the witness had been improperly rejected. After argument and time taken to consider, the barons, differing in opinion, delivered their judgments separately; Pollock, C. B., and Parke, B., holding that the witness had been rightly rejected, and Platt and Martin, BB., that he ought to have been received.

proceeding in any court, or before any person having by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action or proceeding.

"Section 2. Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation.

"Section 3. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

"This act shall take effect immediately."

A bill was subsequently introduced into the New York legislature, which would have had the effect of allowing Mrs. Tilton, the plaintiff's wife, to testify, but failed to become a law. Ultimately, the plaintiff offered to waive any legal objection they might have to Mrs. Tilton as a witness, but the defense declined to call her. McDivitt's edition of the Tilton-Beecher Trial, vol. III. p. 298.

The rule for a new trial accordingly dropped ; but several statutes have since been passed, with the view of settling the law on this subject. The 17 & 18 Vict. c. 122, s. 15, enacted, that the second section of the 14 & 15 Vict. c. 99, should not be deemed to apply to any prosecution, suit, or other proceeding in respect of any offense, or for the recovery of any penalties or forfeitures under any law then, or thereafter to be made relating to the customs or inland revenue. This was repealed by the 18 & 19 Vict. c. 96, s. 44, and re-enacted by sect. 36 of that act. The 20 & 21 Vict. c. 62, without repealing that portion of the 18 & 19 Vict. c. 96, enacts in its 14th section, that "The several acts which declare and make competent and compellable a defendant, to give evidence in any suit or proceeding to which he may be a party, shall not be deemed to extend or apply to defendants in any suit or proceeding instituted under any act relating to the customs." It will be observed that this last statute only speaks of acts relating to the customs ; and none of the above acts makes any mention of the husbands or wives of the parties to the proceedings. But the 18 & 19 Vict. c. 96, s. 36, and the 20 & 21 Vict. c. 62, s. 14, are now repealed by 28 & 29 Vict. c. 104, s. 33. And sect. 34 of that statute enacts, that the 14 & 15 Vict. c. 99, ss. 2 and 3, and 16 & 17 Vict. c. 83, "shall extend and apply to proceedings at law on the revenue side of the court ; and any proceeding at law on the revenue side of the court shall not, for the purposes of this act, be deemed a criminal proceeding, within the meaning of the said sections and act as extended and applied by the present section." By sect. 35, the revenue side of the court, as a court of law, shall be deemed to be a court of civil judicature within the meaning of sect. 103 of the common law procedure Act, 1854, 17 &

18 Vict. c. 125; and sect. 22 contains a similar provision relative to the court of exchequer, exercising jurisdiction of authority in suits relating to the revenues of the crown, and of the duchies of Lancaster and Cornwall, instituted and conducted according to the forms of equitable procedure.

182. The 14 & 15 Vict. c. 99, s. 4, as has been seen, (*n*) retained the incompetency of the plaintiff and defendant in all proceedings instituted in consequence of adultery. (*o*) And by sect. 48 of the 20 & 21 Vict. c. 85, which created the court for divorce and matrimonial causes, it was enacted that the rules of evidence observed in the superior courts of common law at Westminster, should be applicable to and be observed in the trial of all questions of fact in that court. The effect of the 32 & 33 Vict. c. 68, s. 3, (*p*) therefore, will be to render competent as witnesses, in that court, the parties to any proceeding instituted therein in consequence of adultery, and the husbands and wives of such parties.

By the 22 & 23 Vict. c. 61, s. 6, it is enacted, that 'On any petition presented by a wife, praying that her marriage may be dissolved, by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.' And it was held, that a petitioner or respondent, who was examined under that section upon an issue of cruelty or desertion, might be cross-examined on the question of his or her

(*n*) *Supra*, § 174.

(*o*) But a petition for restitution of conjugal rights, to which an answer had been filed, charging adultery, was

held not to be within the act. *Blackborne v. Blackborne*, L. Rep., 1 P. & D. 563.

(*p*) See *supra*, s. 180.

adultery. (q) But, since the 32 & 33 Vict. c. 68, s. 3, a witness cannot be cross-examined, even in mitigation of damages, as to any act of adultery respecting which he or she has not been examined in chief;—the language of that section being, “that no witness in any proceeding . . . shall be liable to be asked or bound to answer any question, tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding, in disproof of his or her alleged adultery.” (r)

183. Before dismissing the subject of the incompetency of witnesses, it will be necessary to advert to certain persons, who, in consequence of their peculiar position or functions, may seem incompetent to give evidence. And foremost among these stands THE SOVEREIGN. It has been made a question whether he can be examined as a witness in our courts of justice, and if so, whether the examination must be on oath in the usual way. Conceding of course, that no compulsory process could be used to obtain the evidence, it seems that both questions ought to be answered in the affirmative; and of this opinion are some modern text writers. (s) It has been objected that as the tribunal, at least the Court of Queen’s Bench, represents the sovereign, there is an absurdity in asking him to give testimony to himself; but the same might be said of his pleading before himself, which nevertheless takes place in all criminal trials—where the sovereign is represented in one sense by the court, and in another by the attorney-general or those who act for him.

(q) *Boardman v. Boardman*, L. Rep., 1 P. & D. 233.

(s) *Tayl. Ev.* § 1246, 5th ed. See *Ph. & Am. Ev.* 8.

(r) *Babbage v. Babbage*, L. Rep. 2 P. & D. 222.

In 2 Rol. Abr. 686, H. pl. 1, is the following passage : "Semble qui le roy ne poet estre un testimonie en un cause per son lettres desouth son signett manuell. Contra Hobard's Rep. 288, enter Abigny et Clifton en Chancery allow." But in *Omichund v. Barker*, (†) L. C. J. Willis says, "Even the certificate of the king under his sign manual of a matter of fact (except in one old case in chancery, *Hob. 213*), has been always refused." The case referred to in these books seems to be that of *Abignye v. Clifton*, *Hob. 213*, temp. Jac. I., in which the question was concerning a promise supposed by the plaintiff to be made to him, of assurance of land upon the marriage of his lady, being daughter and heir apparent to Lord Clifton and his lady. "The king," says the report, "by his letters under his signet manual, certified to the late Lord Chancellor, and also to this, the manner and substance of the promise as it was made to his majesty; in regard whereof his majesty gave to the Lord Abignye £18,000, in lieu of £1,000 per annum in land, which he had promised, which certificate was allowed upon the hearing for a proof, without exception for so much." This case stands alone and amounts to little. 1. The evidence was admitted without exception taken. 2. It is probable that the reason for admitting it was, not that, propter honoris respectum, the sovereign could not be examined as a witness, but a forced analogy between the certificate of the king and the certificate of marriage given by a bishop, &c. And this view derives some confirmation from the fact that, in the same reign, in a case of *Alsop v. Bowtrell*, (u) the Court of King's Bench held for sufficient proof of a marriage at Utrecht, a certificate under

(†) Willes, 550.

(u) Jac. Cor. 514.



the seal of the minister there, and of the town that the parties had been married there, and that they cohabited for two years together as man and wife; a decision condemned by C. J. Willes in *Omichund v. Barker*, and clearly not law at the present day. Perhaps, also, as the certificate in *Abignye v. Clifton* related to a grant of money by the crown, the court may have confounded it with a royal charter; but, in any view of that case, it is far from being a judicial determination, that the testimony of the sovereign can in general be received without oath. Sir Matthew Hale also seems to have thought otherwise, for he says, (x) "If a man be indicted of high treason, the king cannot by his great seal or ore tenus give evidence that he is guilty, for then he should give evidence in his own cause. Nay, although he may in person sit on the king's bench, yet he cannot pronounce judgment in case of treason; but it is performed by the senior judge; for as he cannot be a witness, so he cannot be a judge in *propria causâ*. And the same law is for felony for the same reason, yet in some cases the king's testimony under his great seal is allowable, as in an *essoîn de servitio regis*, the warrant under the great seal is a good testimonial of it." If the sovereign is an incompetent witness under any circumstances, the whole of this passage is unmeaning and irrelevant. The only authorities, however, which Hale cites for the position, that even in criminal cases the sovereign cannot give evidence, are the old records of the reversal in parliament, in the 1 Edw. III., of the attainders in the preceding reign, of the Earl of Lancaster and the Mortimers; (y) which certainly do not bear it out. For the ground

(x) 2 Hale, P. C. 282.

length in 1 Hale, P. C. 344, and 2 Id.

(y) These records are set out at 217, respectively.

of the reversal of those judgments appears clearly, from the records themselves, to have been that the accused were not arranged and tried by their peers in due course of law, but the king's asseveration of their guilt was taken as conclusive. (z) In Taylor on Evidence, (a) it is stated, on the authority of Lord Campbell in his *Lives of the Chancellors*, that "the point arose in the reign of Charles I., when the Earl of Bristol, who was impeached for high treason, proposed to call the king for the purpose of proving certain conversations which he had held with him while prince. The subject was referred to the judges; but they, acting under the direction of his Majesty, forbore from giving any opinion, and the question remains to this day undetermined. In the *Attorney-General v. Radloff*, (aa) Parke, B., said incidentally, for it was wholly needless to the decision of the case, "It is clear that the sovereign cannot be a witness, because there is no means of compelling her attendance." But, although there may be no means of compelling the attendance of a witness who resides out of the jurisdiction of the court, his evidence is perfectly receivable if he attends voluntarily; and there are many questions which may be put to almost any witness, which it is quite discretionary with him whether he will answer. It only remains to add, that no inference can be drawn from the fact, that in the various cases of discharging firearms and throwing missiles

(z) If the general lawlessness of the times of Edw. II. should be deemed insufficient to account for this enormous irregularity, even in a state of prosecution, a solution for it may be found in the views of the middle ages. For instance, in the laws of Wiltroed, King of Kent, about the beginning of the eighth century, § 16, we read,

"Let the word of a bishop and of the king be without an oath, incontrovertible." See *ad id.*, Pufendorf, *de Jur. Nat. & Gent.* lib. 4, cap. 2, § 2, vers. fin.; Devotus, *Inst. Canon.* lib. 3, tit. 9, § XII., not. 1, 5th ed.

(a) § 1246, 4th ed.

(aa) 10 Exch. 84, 94.

at the sovereign, which have occurred from time to time, (*b*) the sovereign was not examined as a witness. For in proceedings for assault or other personal injury, it is not requisite, as matter of law, that the injured party should appear in the witness-box; his absence is only matter of observation, which, in the case of the sovereign, would be fully answered by the inconvenience of calling such a witness, so long as any other satisfactory proof could be procured.

184. The other persons to whom we have alluded, as apparently incompetent to give evidence, are the counsel and attorneys engaged in a cause, and the judges and jurymen by whom it is tried. With respect to one of these there is no difficulty; for it is settled law, and every day's practice, that an attorney is a competent witness either for or against his client; although neither attorney nor counsel will be permitted, without the consent of the client, to disclose matters communicated him in professional confidence.

(*c*) But whether the counsel in a cause are competent witnesses, was formerly a disputed question. In a case of *Stones v. Byron*, (*d*) which was tried before a sheriff, the plaintiff appeared by his attorney, who acted as his advocate, and who, after the witnesses on both sides had been examined, made a speech, in reply, and proposed to call himself as a witness to contradict the defense set up. This was objected to, but allowed by the sheriff; and, a rule for a new trial having been granted, on the ground that the evidence ought to have been rejected, the case came on for argument before Patteson, J., in the bail court. In

(*b*) See the cases of *Hadfield* in 1800, 27 Ho. St. Tr. 1282; of *Collins* in 1832, 5 C. & P. 305; of *Oxford* in 1840, 9 Id. 525, &c.

(*c*) *Infra*, bk. 3, pt. 2, ch. 8.

(*d*) 4 Dowl. & L. 393; 1 B. C. R. 248; Mich. 1846.

support of the rule it was argued, that "it would be a practice attended with the most mischievous consequences, if an attorney or any other person, acting as the advocate of a party, could afterwards present himself before the jury as a witness, to support those statements he had been making in the course of his speech. The characters of an advocate and a witness should be sedulously kept apart. The one was a person zealously and warmly espousing the interests of his client; the other a person sworn fairly and impartially, without bias or favor to either party, to tell the truth of what he had witnessed or heard. The jury might have considerable difficulty in separating those statements which they had heard from a person as advocate, from those which they had heard from the same person as witness." The only authorities cited, were the precedent in the case of *Sir Thomas More*, (c) where the then solicitor-general who was conducting the prosecution, left the bar and was received as a witness for the crown; which the counsel in *Stones v. Byron*, quoting the language of Lord Campbell in his *Lives of the Chancellors*, pronounced an "eternal disgrace of the court who permitted such an outrage on decency;" and the observations of the court of King's Bench in *R. v. Brice*, (f) where it was held, that the prosecutor of an indictment has no right to address the jury and state the case for the prosecution; for this among other reasons, that "the prosecutor may be, and generally is, a witness; and that it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath." It appears, however, that in a case of *R. v. Milne*, reported in a note to *R. v. Brice*,

(c) 1 Ho. St. Tr. 386, 390.

(f) 2 B. &amp; A. 606.

Lord Ellenborough held, that a prosecutor who waived his right to give evidence, was not even then entitled to address the jury. The true ground of the practice unquestionably is, that in contemplation of law the suit is the suit of the crown, and the prosecutor no more interested in it than any other witness. (*g*) Patteson, J., in the case we are now considering, took the view of the defendant's counsel, and made the rule absolute; saying that he did not think the course of proceeding adopted at the trial was proper, or consistent with the due administration of justice; that the evidence of the attorney ought not to have been received; and that, having been received, there ought to be a new trial. In a subsequent case of *Dunn v. Packwood*, also in the bail court, (*h*) a rule for a new trial was moved for on the ground that the plaintiff's attorney had acted as an advocate in the cause, and had then irregularly given evidence as a witness. On showing cause, the case of *Stones v. Byron* was referred to, but sought to be distinguished in this way: that, in the case then under consideration, the attorney simply opened his client's case, and then presented himself as a witness, and did not comment on the evidence offered by the other party, as was done in *Stones v. Byron*. Erle J., however, made the rule absolute, saying, "I think it a very objectionable proceeding on the part of an attorney, to give evidence when acting as advocate in the cause." In the report in the *Bail Court Reports*, he is said to have added, "This principle was acted on by the late Lord Tenterden, and I think it is sound."

(*g*) 2 Rol. Abr. 685, "Testimonies," pl. 5; *R. v. Brice*, 2 B. & A. 606.

(*h*) 11 Jurist, 242; 1 B. C. R. 312; *S. C. nom. Deane v. Packwood*, 4 D. & L. 395, note (b); Hil. 1847.

It will be observed that both these cases are the decisions of single judges, whose language falls short of laying down as a universal rule that, under no circumstances whatever, can counsel or an advocate be examined as a witness in a cause in which he is acting as such. It would, we apprehend, be difficult to support such a position; for there are cases in which the advocate might be the sole repository of the most important evidence. And it is no answer to this to say, that if aware of that fact he ought to decline to act professionally in the cause; for it not unfrequently happens, especially in criminal courts, that facts bearing most powerfully on the issue, appear relevant in the course of a trial, though at its commencement it was impossible to foresee their relevancy. Suppose an indictment for a murder at A., to which the defense set up is a false alibi, *e.g.*, that the accused was on that day and hour in a certain room in a certain house at B.; the counsel for the prosecution may have been alone in that room at that day and hour, and may know of his own knowledge that the accused was not then there; could his evidence be excluded?

These cases, however, of *Stones v. Byron and Dunn v. Packwood*, taken at the strongest, only show that an advocate is not a competent witness for his client, and leave untouched the question whether he is competent for the other side. Now it would be very dangerous to allow a party who knows that important, perhaps the only important, evidence against him will be given by an advocate, to shut that person's mouth by retaining him as his counsel; and if it be said that no counsel should accept the retainer under such circumstances, the answer is, that the question is not what the honor of the bar exacts, but what the law

will allow. Professional privileges may be abused, and the supposed impeccability of every member of a numerous profession is an unsafe basis of legislation. Besides, it may be as well to remark, that under the old law, previous to the 6 & 7 Vict. c. 85, when an interest in the event of the suit was ground for the rejection of a witness, the rule did not apply to a case where the interest was fraudulently acquired in order to create incompetency. (*i*)

185. Nor is this matter so barren of authority, as appears to have been assumed in the two cases decided in the Bail Court. In Bacon's Abridgment, Evidence, A. 3, it is said, "The inconveniency would be very great, if a counsel were not at all to be made use of as a witness; for by this means every such person's evidence may be taken off by giving him a fee." In *Cuts v. Pickering*, (*k*) the court laid down obiter, that with respect to competency to bear testimony the same law was of an attorney or counsel. And Sir John Hawles, in his observation on the State Trials in 1 Jac. 11, (*l*) tells us, "Every man knows, that a counsel has been enforced to give evidence against his client, provided it be not of a secret communication to him by his client." The same is stated in the book called "Trials per Pais;" (*m*) and in the cases of *Waldron v. Ward* (*n*) and *Sparke v. Middleton*, (*o*) counsel who had been employed by a party were examined. There can be no doubt that, to call an advocate in the cause as a witness is most objectionable, and should be avoided whenever possible. But we apprehend that a judge has no right in point of law to reject him;

(*i*) Ph. & Am. 144.

(*k*) 1 Ventr. 197.

(*l*) 11 Ho. St. Tr. 459.

(*m*) Page 385.

(*n*) Sty. 449.

(*o*) 1 Keb. 505. See also Mar. 83, pl. 136.

although if the court above were of opinion that under all the circumstances, any practical mischief had resulted from the reception of such a witness, they might, in their discretion, grant a new trial, if not as matter of right, at least as matter of judgment.

186. These views are confirmed by the case of *Cobbet v. Hudson*. (p) After the 14 & 15 Vict. c 99, had allowed parties to a suit to be witnesses, it became clear that—inasmuch as all persons who sue or defend in a court of justice may, if so disposed, conduct their own causes without legal assistance—the question, whether a person who so conducts his own cause can also be a witness in it, must soon present itself for decision; and the point at length arose in the case referred to. At the trial before Lord Campbell, C. J., the plaintiff, who sued in forma pauperis, conducted his cause in person. The Lord Chief Justice told him that if he addressed the jury as an advocate, he could not be permitted to give evidence as a witness. The plaintiff elected to act as advocate and not as a witness. A verdict having been given for the defendant, a rule was obtained for a new trial on the ground that the above ruling was erroneous. This rule was argued before Lord Campbell, C. J., Coleridge, Wightman, and Erle, JJ., and, after time taken to consider, the following judgment was delivered by Lord Campbell: “We are of opinion that the rule for a new trial should be made absolute, on the ground that the plaintiff was improperly told that he could not be permitted to address the jury as his own advocate, without agreeing to waive his right to be examined as a witness in his own behalf. We are fully aware of the inconvenient consequences which



must follow, from a party to a suit being alternately during the trial advocate and witness; and we express our strong disapprobation of such a practice. But we cannot say that the judge at nisi prius has at present sufficient authority to prevent it. Before the recent statute (14 & 15 Vict. c. 99), the party had a right to conduct his own cause in person, although he could not be his own witness; and by that statute (sec. 2) he is rendered 'competent and compellable to give evidence' as a witness, without any abridgment of his former right to act as his own advocate. We must be careful that we do not abridge the rights conferred on suitors by common or statute law, while we are acting merely on views of policy and expediency, with respect to which different judges may form different opinions. It was stated at the trial, that verdicts had several times been set aside, on the sole ground that the same person had been permitted to act as advocate and to be examined as a witness; but when the cases alluded to are examined, it will be found that the rigid rule contended for is not laid down in them. In *Stone v. Byron*, 4 D. & L. 493, upon a trial before the sheriff, an attorney having addressed the jury as advocate for the plaintiff, and then been examined as a witness for him, Patteson, J., observed: 'I must say that I do not think that such a course of proceeding is proper, or consistent with the due administration of justice. It seems to me, therefore, that his evidence ought not to have been received, and having been received, that there ought to be a new trial.' But there the evidence had been received after the defendant's case was closed, and after the plaintiff's advocate had replied; and this irregularity, testifying that the undersheriff who presided was unduly influenced, appears to have been a ground of the decision. In *Deane v. Packwood*, 4 D. & L. 395, note (b)

(very shortly reported in a note to *Stones v. Byron*, 4 D. & L. 393), which was likewise a trial before the sheriff, the plaintiff's attorney, after addressing the jury as advocate, was examined as a witness; and Erle, J., granted a new trial on this ground, but without laying down a general rule on the subject, or professing to extend the authority of *Stones v. Byron*. In *R. v. Brice*, 2 B. & A. 606, it was laid down that, on the trial of an indictment for perjury, the prosecutor shall not be admitted to address the jury; the court observing: 'the prosecutor may be, and generally is, a witness; and it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath.' But there the king was to be considered the party; and the private prosecutor had no right to address the jury, even if he waived his right to be examined as a witness. It was said, at the trial of this cause, that since the late evidence act (14 & 15 Vict. c. 99) passed, it had been decided, both before the Chief Justice of the Common Pleas, and the chief baron of the exchequer, that a party cannot be permitted to act as his own advocate and to be examined as his own witness; but, after diligent inquiry, no such decision can be discovered. The validity of the rule contended for, is rested on the authority of the judge at *Nisi Prius*, to regulate the procedure in a way that may be most conducive to the investigation of truth; and the instance was referred to of an order for the witnesses to leave the court, with an intimation that any witness, who remains in court or returns into court before he is called, shall not be examined. But the judge must be governed by established practice and the general rules of law. With respect to ordering the witnesses out of court although this is clearly within the power of the judge

and he may fine a witness for disobeying this order, the better opinion seems to have been that his power is limited to the infliction of the fine, and that he cannot lawfully refuse to permit the examination of the witness; see *Cook v. Nethercote*, 6 C. & P. 741; *Thomas v. David*, 7 Id. 350; *R. v. Colley*, 1 Moo. & Mal. 329. We may hope that, without any positive rule against a party addressing the jury, and being examined as a witness on oath on his own behalf, a practice so objectionable is not likely to spring up; for it is not only contrary to good taste and good feeling, but, as it must be revolting to the minds of the jury, it will generally be injurious to those who attempt it. In such a case as the present there is not the smallest color for resorting to it; for the plaintiff, suing in formâ pauperis, had counsel assigned to him, who must be supposed to have been ready to support at the trial the certificate he had given, that the plaintiff had a good cause of action; and an offer was freely made to the plaintiff, to postpone the trial till the attendance of this gentleman could be procured. If the practice does gain ground to a degree seriously injurious to the due administration of justice, the legislature may interfere, or the judges, under the authority vested in them, may make a general order whereby it may be prevented in future. But, as the law now stands, we think the judge at *Nisi Prius* exceeded his authority, in refusing to allow the plaintiff to be examined as a witness on oath after addressing the jury as an advocate; and that upon a new trial he must be permitted to do both, if he shall be so inclined." The rule for a new trial was accordingly made absolute.

187. Next as to the case of jurors. It is fully settled, that a jurymen may be a witness for either of

the parties to a cause which he is trying. (q) And it is essential that this should be so, as otherwise, persons in possession of valuable evidence would be excluded if placed on the jury panel, and might even be fraudulently placed there for the purpose of excluding their testimony. But here an important distinction must be borne in mind, viz. the difference between general information, and particular personal knowledge. A writer on this subject states the rule thus. (r) "It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge; for it could not be known whether the verdict was according to or against the evidence; it is very possible that the private grounds of belief might not amount to legal evidence. And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he privately state such facts, it will be a ground of motion for a new trial." This distinction is well illustrated by the following cases. In *R. v. Rosser*, (s) the accused was indicted for stealing, in a dwelling-house, a watch and seals, alleged to be of the value of £7; and, a witness for the prosecution having sworn that the property in his opinion was worth that sum, the jury after the summing-up, inquired if they were at liberty to put a value on the property themselves

(q) 3 Blackst. Com. 375; Trials per Pais, 384; 2 Hawk. P. C. c. 46, s. 17; 1 Lill. Pract. Reg. 552; 2 Id. 126; *R. v. Reading*, 7 Ho. St. Tr. 267; *R. v. Heath*, 18 Id. 123; *Bennet v. The Hundred of Hartford, Sty.* 233; *Fitzjames v. Moys*, 1 Sid. 133; *Anon.*, 1 Salk. 405; *R. v. Rosser*, 7 C. &

P. 648; *Manley v. Shaw*, Car. & M. 361.

(r) 1 Stark. Ev. 542, 3rd ed.; Id. 816, 4th ed. See acc. 1 Lill. Pract. Reg. 552; 2 Id. 126; 6 Ho. St. Tr. 1012 (note); 18 Id. 123.

(s) 7 C. & P. 648.

To this Vaughan, J., answered, "If you see any reason to doubt the evidence on the subject, you are at liberty to do so. Any knowledge you may have on the subject you may use. Some of you may perhaps be in the trade." And Parke, B., added "If a gentleman is in the trade, he must be sworn as a witness. That general knowledge which any man can bring to the subject may be used without; but if it depends on any knowledge of the trade, the gentleman must be sworn." And in *Manley v. Shaw*, (*t*) which was an action against the acceptor of a bill of exchange, after the handwriting of the defendant had been proved, one of the jury, on looking at the bill, said that the stamp was a forgery; and stated to the court, that several respectable houses had been found in possession of forged stamps to a great amount: on which Tindal, C. J., said, "The gentleman of the jury who says that the stamp is a forgery, should be sworn as a witness, to give evidence to his brother jurors before they can act upon his opinion;" and told the juryman that, if he thought proper, he might be sworn and examined as a witness to prove the forgery. The juryman declining this, and there being no other evidence, the judge directed a verdict for the plaintiff.

**188.** Lastly, with respect to judges. Notwithstanding the language attributed to Gascoigne, C. J., on this subject, (*u*) it is clearly no objection to the competency of a witness, that he is named as a judge in the commission under which the court is sitting. (*x*) But a distinction has been taken with respect to the judge who is actually trying the cause; (*y*) and it

(*t*) Carr. & M. 361.

(*u*) P. 7 H. IV. 41 A.; and see Plowd. 83.

(*x*) 2 Hawk. P. C. c. 46, s. 17; Bac. Abr. Ev. (A. 2); R. v. Hacker, J.

Kely. 12; Observations of Sir J. Hawles, 11 Ho. St. Tr. 459.

(*y*) Tayl. Ev. § 1244, 4th ed; 1 Greenl. Ev. § 364, 7th ed.

may be observed that, on the trial of one of the regicides in 1660, when two of the members of the commission came down from the bench to give evidence, they did not return to it until after that trial was concluded; (*z*) this, however, may have been matter of taste and feeling. When a nobleman is tried by the House of Lords, any of the peers is a competent witness; (*a*) but then, on such occasions, each peer sits in the capacity both of judge and juryman. The objection, if it be one, to the competency of the judge who presides at the trial rests, not on the ground of his having to form a judgment on the case—this argument would exclude the juryman—but on one analogous to that urged against the competency of counsel, viz. the difficulty which the jury would have, in discriminating between his testimony and his discretion to them on matters of law, or his comments on the evidence given by other witnesses; to which the same answer presents itself, namely, that the presiding judge may be the sole depositary of important evidence, the relevancy of which to the issue raised, cannot even be suspected until the case is gone into. Besides, the litigant parties have no voice whatever in the selection of the judge, and cannot challenge him, either peremptorily or for cause. Sir John Hawles, in the observations to which we have already referred, says, (*b*) “Every man knows that a judge in a civil matter tried before him has been enforced to give evidence, for in that particular a judge ceases to be a judge, and is a witness; of whose evidence the jury are the judges, though he after reassume his authority, and is afterwards a judge of the jury’s verdict.” There can be no

(*z*) *R. v. Hacker*, J. Kely, 12.

*Macclesfield’s Case*, 16 Id. 1252,

(*a*) *Lord Stafford’s Case*, 7 Ho. 1391.

St. Tr. 1384, 1458 1552; *Earl of* (*b*) 11 Ho St. Tr. 459.

doubt, however, that if a judge gives evidence he must be sworn, and be examined and cross-examined like any other witness.<sup>1</sup>

<sup>1</sup> The Hon. John Appleton, Chief Justice of Maine, in the preface to his valuable work on "The Rules of Evidence," states the conclusions of his researches and experience to be: 1. But all persons without exception, who having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses; 2. that objections may be made to the credit but never to the competency of witnesses; 3. that while the best evidence should always be required, the best existing evidence should not be excluded because it is not the best evidence of which the case in its nature is susceptible. The learned author goes on to say that many of the reforms pointed out in his Essay have been partially adopted. Interest and infamy in very many of the states, have ceased to be ground for the exclusion of testimony. A limited admission of the testimony of the husband and wife has been allowed in cases to which one or the other is a party. The parties in civil cases, with greater or less restrictions upon their testimony, have been received or compelled to testify in their own cases. In offenses of the lowest grade of criminality the accused in one state (and since then in others) has been admitted as a witness in his own behalf. But incompetency, from defect or from a want of religious belief, is still the law in most of the states. . . . The law as to confessions and hearsay continues in a condition pre-eminently chaotic. Different courts, and the same court on different occasions, employ differing modes of extracting proofs. . . . So far as changes have been made, their practical working in the administration of the law has been such as to make it a matter of astonishment how courts could have ever hoped to administer justice, when the evidence now received was excluded.—Preface, p. ii.

## CHAPTER III.

## GROUNDS OF SUSPICION OF TESTIMONY.

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189. "Exceptions to the credit of the witness," says Sir Matthew Hale, (*a*) "do not at all disable him from being sworn, but yet may blemish the credibility of his testimony; and in such case the witness is to be allowed, but the credit of his testimony is left to the jury, who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility of the witness and his testimony; and these exceptions are of that great variety and multiplicity, that they cannot easily be reduced under rules or instances." They have been immensely increased in consequence of the statutes 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83; as interest in the event of the cause and infamy of character, which before those statutes constituted objections to the competency of a witness, may now be urged to the jury as objections to his credit. (*b*)

190. "Witnesses," says Sir Edward Coke, (*c*) 'ought to come to be deposed untaught, and without

(*a*) 2 Hale, P. C. 276, 277.

(*b*) On the value of human testi-

mony in general, see Introduction pt. I.

(*c*) 4 Inst. 279.



instruction, and should wish the victory to the party that right hath, and that justice should be administered : and should say from his heart, 'Non sum doctus, nec instructus, nec curo de victoriâ, modo ministretur justitia.'” (*d*) This truly happy frame of mind is, however, not always met with ; for there is no possible interest or motive which may not, under some state of circumstances, taint the testimony of man with falsehood or misrepresentation. Much of course depends on the physical constitution, and the character, moral and religious, of the individual. Some persons seem almost above any degree of temptation ; others, who resist long, succumb at last ; others yield on slight pressure ; and some scarcely wait to be tempted. To enumerate these interests or motives, would be to enumerate the springs of human action ; (*e*) but the following are among the principal.

**191.** First, then, of pecuniary interest, as being the most obvious. This was formerly a ground of incompetency ; (*f*) and in order to estimate its weight, the condition and circumstances in life of the witness should, if practicable, be ascertained and taken into consideration. The temptation which poverty affords to perjury needs little comment.

“ . . . . . Jures licet et Samothracum  
Et nostrorum aras ; contemnere fulmina pauper  
Creditur atque deos, dîs ignoscentibus ipsis.” (*g*)  
“ En grande pauvreté n’y a pas grande loyauté.” (*h*)

Expressions like these however are, if understood literally, libels on human nature ; and the rich and great are subject to temptations of their own. (*i*)

(*d*) See acc. *Devotus*, *Inst. Canon.* lib. 3, tit. 9, § XVII. 5th ed.

(*g*) *Juvenal. Sat.* 3, vv. 144 et seq.

(*e*) See further on this subject, 5 §§ 190 and 320.

(*h*) *Bonnier, Traité des Preuves,*

*Benth. Jud. Ev. bk. 10, ch. 2 et seq.*

(*i*) *Infra.*

(*f*) *Supra*, ch. 2.

**192.** Secondly. A powerful source of false testimony is to be found in the relations between the sexes. Previous to the 16 & 17 Vict. c. 83, husband and wife were incompetent witnesses for or against each other, in most civil, as they still are in most criminal, cases (*k*)—an exclusion based, not so much on supposed affection between them, as on an artificial unity of person established by the policy of the law. But the existence of any other relation of this kind—such as that of a man with his kept mistress, &c.—only goes to the credit of a witness. Whether a man's wife or his kept mistress is most likely to bear false testimony in his favor, depends on circumstances. In the one case there is, by law, an almost indissoluble unity of person, accompanied most usually by a unity of interest, but still where affection may or may not exist: in the other, the relation probably originated in at least some degree of affection on the part of the man; but then he may at any moment put an end to it, which in many instances would deprive a woman of the means of subsistence, whose reputation has been forfeited.

**193.** Thirdly. The interest arising out of other domestic and social relations. This may have its source either in affection, desire of revenge, or a dread of oppression or vexation. In the laws of some countries, blood relationship within certain degrees has been made a ground of incompetency; (*l*) and friendship or enmity with one of the litigant parties, may justly cause evidence to be looked on with suspicion. (*m*) Nor do even these supply the most efficient motives to falsehood. A parent in his family, a mil-

(*k*) See the preceding chapter.

(*m*) Dig. lib. 22, tit. 5, l. 3. lib. 48,

(*l*) Dig. lib. 22, tit. 5, ll. 4 and 5; tit. 18. l. 1, §§ 24 and 25; Domat, Lois Civiles, pt. 1, liv. 3, tit. 6, sect. 3, § X.

loc. cit. §§ XI. and XII.

itary, ecclesiastical, official, or feudal superior may often, without exposing himself to danger, or even shame, inflict mischief almost boundless on those who are subject to his authority. "Idonei non videntur esse testes, quibus imperari potest, ut testes fiant," said the Roman law. (*n*) Among us, however, this only goes to the credit of the witness.

194. Fourthly. Perjury is often committed to preserve the reputation of the swearer. An example of this may be seen in those cases, and they are of frequent occurrence, where the person called as a witness has, on some former occasion, given a certain account of the transaction about which he is interrogated, and is afraid or ashamed to retract that account.

195. Fifthly. The last source of bias which we shall notice, is the feeling of interest in or affection for others. A man who belongs to a body, or is a member of a secret society, governed by principles unknown to the rest of mankind, comes before the tribunal loaded with the passions of others in addition to his own. (*o*) To this head belong those cases, where mendacious evidence is given, through the sympathy generated by a similarity of station in life, or a coincidence of social, political, or religious opinions, and the like. This is very frequently found in witnesses from the higher walks of society; and it is not easy for a hostile advocate to deal with such witnesses:—for although it is evident they are misleading the tribunal, their station and demeanor alike render it unsafe to speak of them as perjured. (*p*)<sup>1</sup>

(*n*) Dig. lib. 22, tit. 5, l. 6.

abundabit, constirmitatem; si humiles

(*o*) Introd. pt. 1, § 20.

producet, vilitatem; si potentes, gra-

(*p*) "Si deficietur numero" (scil. tiam oportebit incessere." Quintil. testium) "pars diversa, paucitatem; si Inst. Orat. lib. 5, c. 7.

<sup>1</sup> And so other grounds for discrediting a witness might be—His reputation for truth and veracity: See *Rolls v. State*, 46

Ala. 204; *Rudsdill v. Slingerland*, 18 Minn. 380; *Graham v. Chrystal*, 2 Abb. (N. Y.) App. Dec. 263; *State v. Spencer*, 64 N. C. 316; *Mead v. McGraw*, 19 Ohio St. 55; *Mercer v. Wright*, 3 Wis. 645. His sources of information: *Chance v. Indianapolis, &c. Road Co.*, 32 Ind. 472; *Wetherbee v. Norris*, 103 Mass. 565; *Belcher v. Connor*, 1 S. C. 88; *Richardson v. Mercer*, 31 Ill. 263; *Rogers v. Ritter*, 12 Wall. 317; *Real v. People*, 53 Barb. 551, 579; 8 Abb. (N. Y.) Pr. N. S. 314. Which involves the question of expert testimony—matter of opinion, &c.: *State v. Smith*, 22 La. Ann. 468; *Hall v. Costello*, 48 N. H. 176; *Real v. People*, 42 N. Y. 270; *Bank of the Commonwealth v. Mudgett*, 44 Id. 514; *Teerpenning v. Corn, &c. Ins. Co.*, 43 Id. 279; *Bedell v. Long Island R. R. Co.*, 44 Id. 367; *Swan v. Middlesex Co.*, 101 Mass. 193; *Snyder v. Western Union R. R. Co.*, 25 Wis. 60; *Marcy v. Barnes*, 82 Mass. (16 Gray) 161; *Tyler v. Todd*, 36 Conn. 218; *Taylor Will Case*, 10 Abb. (N. Y.) Pr. N. S. 301; *Young v. Makepeace*, 103 Mass. 50; *Long v. First, &c. Congregation*, 63 Pa. St. 156; *Call v. Byram*, 39 Ind. 499; *State v. Morphy*, 33 Iowa, 270; *Ardesco Oil Co. v. Gilsen*, 63 Pa. St. 146; *Slater v. Wilcox*, 57 Barb. 604; *Smith v. Kobbe*, 59 Barb. 289; *Moulton v. McOwen*, 103 Mass. 587. A witness cannot be called upon to give an opinion as to a mere probability which has no basis of fact; *People v. Rogers*, 13 Abb. (N. Y.) Pr. N. S. 370; but see, as to this, *Erickson v. Smith*, 2 Abb. (N. Y.) App. Dec. 64; compare *Bishop v. Spening*, 38 Ind. 143; *Dexter v. Hall*, 15 Wall. 9. The admissibility of an expert's opinion depends upon the locality where, or the circumstances under which, he obtained his experience, see *Lawton v. Chase*, 108 Mass. 238; *Delaware, &c. Tow Boat Co. v. State*, 69 Pa. St. 36. The rule as to expert testimony as to a foreign law applied. See *Barrows v. Downs*, 9 R. I. 446, where a Spanish lawyer, who had practiced his profession in Cuba, was allowed to testify from a printed copy of the Spanish code of commerce, as to the laws regulating special partnerships. And such expressions as "I think," "we supposed," and the like, do not render the testimony of experts incompetent. *State v. Porter*, 34 Iowa, 131. The fact of inconsistent statements and conflicting testimony is also a fact involving the credibility of a witness. See *Carroll v. Charter Oak Ins. Co.*, 1 Abb. (N. Y.) App. Dec. 316; *Carver v. Touthain*, 38 Ind. 530; *Mathilde v. Levy*, 24 La. Ann. 421; *Riley v. Butler*, 36 Ind. 51; *Whittier v. State*, 47 Ga. 297; *Commonwealth v. Marrow*, 3 Brews. (Pa.) 402; *Romerlze v. East River, &c. Bank*, 2 Sweeney (N. Y.) 82; *Spaunhorst v.*

Link, 46 Mo. 197; State v. Kingsbury, 58 Me. 238; Williamson v. Peel, 29 Iowa, 458; Johnson v. N. Y. Central R. R. Co., 39 How. (N. Y.) Pr. 127; Cronly v. Murphy, 64 N. C. 489. As to inconsistent statements, see State v. Noyes, 36 Conn. 80; Powers v. State, 44 Ga. 209; State v. Collins, 32 Iowa, 36; May v. Butterworth, 100 Mass. 75; Gibbs v. Linabury, 22 Mich. 479; Stewart v. People, 23 Id. 63; Ordway v. Haynes, 50 N. H. 159; Sloan v. New York, &c. R. R. Co., 45 N. Y. 125; Warren v. Haight, 62 Barb. 490.

## PART II.

## REAL EVIDENCE.

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196. "Real evidence"—the *evidentia rei vel facti* of the civilians—(*a*) means all evidence of which any object belonging to the class of things is the source ; persons also being included in respect of such properties as belong to them in common with things. (*b*) Thus where an offense or contempt is committed in presence of a tribunal, it has direct real evidence of the fact. So formerly, on an appeal of mayhem, the court would in some cases inspect the wound, in order to see whether it were a mayhem or not, (*c*) and if the mayhem was obvious, such as striking off an arm, &c., the proof was both real and direct. But in most instances real evidence is only circumstantial in its nature, (*d*) *i. e.* evidence from which the existence of the principal fact is inferred by a process of reasoning.

197. Real evidence is either immediate or reported. (*e*) Immediate real evidence is where the thing which is the source of the evidence is present to the senses of the tribunal. (*f*) This is of all proof the most satisfactory and convincing—"Cum adsunt testimonia rerum, quid opus est verbis"—(*g*) but, as already stated, it is rarely available, at least with respect to principal facts. And so sensible is the law of

(*a*) Mascard. de Prob. Quæst. 8 ; Calv. Lexic. Jurid. ; and the judgment of Lord Stowell in *Evans v. Evans*, 1 Hagg. C. R. 105.

(*b*) 3 Benth. Jud. Ev. 26 ; 1 Id. 53.

(*c*) 28 Ass. pl. 5 ; 22 Id. pl. 99 ; 37 Id. pl. 9. See also Mascardus de Prob. Quæst. 8 n. 10.

(*d*) See 1 Benth. Jud. Ev. 55 ; 3 Id. 33.

(*e*) 3 Benth. Jud. Ev. 33.

(*f*) Where the production of real evidence in open court would be indecent, the jury may inspect it in private, as was done in the case before Lord

Hale, where a man successfully defended himself against a charge of rape, by showing that he had a frightful rupture. 1 Hale, P. C. 635, 636. See also Bonnier, *Traité des Preuves*, § 77.

(*g*) 2 Bulst. 53. On this subject Mascardus (de Prob. Quæst. 8, n. 20), and Bonnier (*Traité des Preuves*, § 51) quote the well-known lines from the *Ars Poetica* of Horace :

"Segnius irritant animos demissa per aurem.

Quàm quæ sunt oculis subjecta fidelibus."

its transcendent value, that in some cases the production of certain species of real evidence is peremptorily exacted, to the exclusion of all substitutes. Thus, it is an established rule, that a prisoner shall not be convicted of murder, "unless the fact were proved to be done, or at least the body be found dead. (*h*)<sup>1</sup> So, a coroner's inquest, to ascertain the cause of the death of a person who has died suddenly, must be held *super visum corporis*. (*i*) So, when a fine was levied, the parties were required by the ancient statute 18 Edw. 1 st. 4, *Modus levandi fines*, to appear personally before the justices, in order that it might be discerned by them if they were of full age and good memory, &c. (*k*) And the same seems to hold in the case of a recognizance; (*l*) which is always expressed to be entered into on the personal appearance of the party before the justice who takes it. (*m*) On this principle, in a great degree, rests the just and sound rule of English judicature, that the evidence of witnesses must in general be given by them personally in open court—the real evidence afforded by their demeanor, being one of the most powerful securities against perjury and fraud. There are likewise instances where the production of real evidence is exacted

(*h*) 2 Hale, P. C. 290. As to what is sufficient to prove "the fact" "to be done," so as to dispense with the necessity of proving that the dead body has been found, see *R. v. Hindmarsh* 2 Leach, 569.

(*i*) 1 Blackst. Com. 348; 4 Id. 274; Holt, 167; 21 Edw. 4, 70, 71; 6 & 7 Vict. c. 83, s. 2.

(*k*) For this reason a fine levied by an idiot, lunatic, &c., was good, for the law presumed that the judge would

not allow the party to levy it unless he were of sound mind. See *Beverley's Case*, 4 Co. 123 b; *Mansfield's Case*, 12 Id. 124; and the argument in *Molton v. Camroux*, 2 Exch. 487.

(*l*) *Beverley's Case*, 4 Co. 124 a. *Semble per Parke, B.*, in *Molton v. Camroux*, 2 Exch. 487, 493.

(*m*) See the precedents in *Dalton's Country Justice*, *Burn's Justice of the Peace*, &c.

<sup>1</sup> See, as to *corpus delicti*, *Udderzook's case*, cited *post*, p 311.



by practice. Thus on an indictment for larceny, if the stolen property has been found, the court usually insists on its being produced before the jury; although, when the goods stolen are of a perishable nature, this is, of course, frequently impossible; neither would it be required when likely to be inconvenient or offensive, as where flesh stolen is in an advanced state of decomposition, &c. But real evidence is often produced at trials, when it is not exacted by any rule either of law or practice. Valuable evidence of this kind is sometimes given by means of accurate and verified models, (*n*) or, by what is technically termed a "view," *i.e.*, a personal inspection by some of the jury of the locus in quo—a proceeding allowed in certain cases by the common law, (*o*) and much extended by the statutes 4 Anne, c. 16, s. 8; 6 Geo. 4, c. 50, s. 23; 15 & 16 Vict. c. 76, s. 114, and 17 & 18 Vict. c. 125, s. 58; which authorized the court or a judge, on the application of either party to an action, to grant a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which might be material to the proper determination of the question in dispute. And, now, by "The Supreme Court of Judicature Act, 1873," (*p*) it is provided, that the court or a judge may, upon the application of any party to an action, and upon such terms as may seem just, make any order for the detention, preservation, or inspection of any property, being the subject of such action; and for all or any of the purposes aforesaid, may authorize any person or persons, to enter upon any land or building in the pos-

(*n*) It is the same in France. See 2 Salk. 665; 2 Wms. Saund. 44 u, Bonnier, Traité des Preuves, § ncte 4.

55.

(*p*) 36 & 37 Vict. c. 66. Sched Rule 45.

(*o*) F. N. B. 123 C, 128 B., 184 F.;

session of any party to such action ; or any samples to be taken, or experiments tried, which seem necessary or expedient, for the purpose of obtaining full information or evidence.

198. Reported real evidence is, where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents. (*q*) This sort of proof is, from its very nature, less satisfactory and convincing than immediate real evidence. “To the reporting witness, indeed, if his report be true, it was so much immediate, so much pure real evidence ; but to the judge it is but reported real evidence. The distinction is far from being a purely speculative one ; practice requires to be directed by it. Reported real evidence is analogous to hearsay evidence, and labors more or less under the infirmities which attach to that modification of personal evidence, compounded of circumstantial evidence and direct,—of real evidence, and ordinary personal evidence (evidence given in the way of discourse) ; it unites the infirmities of both. The lights afforded, or said to have been afforded by the real evidence, are liable to be weakened in intensity, and altered in color, by the medium through which it is transmitted.” (*r*)

199. Circumstantial real evidence partakes of the nature of all other circumstantial evidence in this, that the persuasions or inferences to which it gives rise, are sometimes necessary and sometimes only presumptive. And as it is in criminal proceedings that the value and dangers of this mode of proof are chiefly conspicuous, we shall devote the rest of this chapter to a consideration of its probative force and

(*q*) 3 Benth. Jud. Ev. 33.

(*r*) 3 Benth. Jud. Ev. 34.

infirmative hypotheses in those proceedings. By "infirmative fact" or "hypothesis" is meant any fact or hypothesis which, while insufficient in itself either to disprove or render improbable the existence of a principal fact, yet tends to weaken or render infirm the probative force of some other fact which is evidentiary of it. (*s*)

200. In the case of necessary inferences, properly so called, there can be no infirmative facts or hypotheses. As instances—where a female was found dead in a room, with every sign of having met a violent end, the presence of another person at the scene of action was demonstrated, by the bloody mark of a left hand visible on her left arm. (*t*) And where a man was found killed by a bullet, with a discharged pistol lying beside him, the hypothesis of his having committed suicide with that pistol was negatived, by proof that the bullet which caused his death was too large to fit it. (*u*)<sup>1</sup>

(*s*) See 3 Benth. Jud. Ev. . 14. "Socrates, who, professing to affirm nothing, but to infirm that which was affirmed by another, hath, exactly expressed all the forms of objection, fallacy, and redargution." Bac. Adv. Learn. bk. 2.

(*t*) Case of Norkott and others, 10 Harg. St. Tr. App. No. 2, p. 29.

(*u*) Theory of Pres. Proof, App Case 2; Wills, Circumst. Ev. 80, 3rd ed. See other instances in Beck's Med. Jurispr. p. 591, 7th ed.

<sup>1</sup> See *Ruloff v. People*, 45 N. Y. 1213-25; *Potts v. State*, 43 Miss. 472; *State v. Seates*, 5 Jones (N. C.) 420. One of the most remarkable as well as one of the latest cases on record, involving the question of the corpus delicti, is that of William E. Udderzook, tried at Westchester, Pennsylvania, November 3d, 1873. The prisoner was convicted of murder in the first degree, and after an appeal, was subsequently executed. The following is the charge of the judge (Butler) to the jury:

Gentlemen of the Jury: The prisoner at the bar, as you have learned, is charged with murder.

This offense consists in the unlawful killing of any human creature, against the peace of the commonwealth, with malice aforethought. The distinguishing criterion of the crime is

201. Cases of this kind are, however, of rare occurrence, and when they do present themselves the facts speak too plainly to need comment. In the vast malice aforethought. For the purposes of the case we are trying, it is sufficient to say that where one individual maliciously takes the life of another, he is guilty of murder.

The case of the commonwealth rests upon what is known as circumstantial evidence. And indeed where willful, deliberate murder, contemplated beforehand, is committed, it rarely occurs that direct, positive evidence respecting it exists. Perpetrated, as it usually is, by lying in wait, by means of poison, or by falling upon the victim when no one is by, the only evidence must, commonly, be found in the circumstances attending it. And this character of evidence is ascertained by experience to be little, if any, less satisfactory than that which is known as direct and positive. Where the circumstances relied upon are properly established, and the inferences arising from each one, and from all of them combined, point naturally in one direction, there is no greater danger in following them to their conclusion, than attends all human investigation. That we may err in such cases is possible; but so we may where the evidence is direct or positive; the circumstances may possibly mislead, but so may the eyes, or the ears, or the dishonesty of witnesses.

As was said by Chief Justice Gibson in the case of the Commonwealth v. Harman, 4 Barr, 269: "The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact as to a number of facts, by which, if true, the question of guilt or innocence is solved. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect, but you are not, therefore, to stop its wheels. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief,—that is, actual disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear."

majority of instances, the inference to which a piece of circumstantial real evidence gives rise, is only probable or presumptive. On charges of homicide, for in-

Now turning to the evidence, we find that on the 9th day of July last (1873), as John Hurford was passing Baer's Woods, on the Gap and Newport Turnpike in this county, he observed buzzards about it, and an unpleasant odor in the vicinity. Two days later, as Gainer P. Moore passed the same place, on his way to Cochranville, he observed buzzards there in large numbers, and a very offensive odor. When returning home he entered the woods to ascertain the cause of what he observed; and at the distance of about sixty-five feet from the turnpike, discovered (in his own language) "something mysteriously hidden;" a small part of which was uncovered (doubtless by the birds), the balance concealed by means of leaves and a thin covering of earth, with the dead limbs of trees placed lengthwise over it. Obtaining the aid of Mr. Rhoades, who lives some distance away, he returned to the place with a shovel. Upon the earth being raised up at the left side of the body, a bloody shirt was uncovered. Next the head was raised, and the body ascertained to be that of a man. At this time, the witness says, the face was quite white and natural; and he believes he could have recognized it, had he been acquainted with the individual in life. It was now about half-past five o'clock in the evening. They left the grave in the condition described; and (after attempting to procure the aid of a man who drove by on the turnpike) went to Penningtonville, and notified the deputy coroner, Mr. Rambo. This gentleman, with several others, started for the place, and reached it, as they have said, about seven o'clock, being a little before sunset. Mr. Moore also returned soon after. The color of the skin had now changed, and was quite dark—as you have heard it described. The deputy coroner had the covering removed from the other parts of the body, and it was then seen that the legs and arms were off. That part of the abdomen which was exposed when Mr. Moore first entered the woods, was open, the entrails had disappeared, a mass of semi-liquid corruption occupying their place. In another part of the woods, about sixty-five feet distant, the arms and legs were found, also under a slight covering of earth and leaves. The body, with the limbs, was removed to the turnpike, placed in a box, and then taken to Cochranville. At the woods, and at Cochranville, it was examined by Dr. Bailey (more critically at the latter place), and he has de-

stance, the nature of the weapon with which the fatal blow was given, is of the utmost importance in determining whether malice existed or ought to be prescribed to you the marks he found upon it. He says there was an opening in the side, between the third and fourth ribs; another he thinks between the fifth and sixth ribs; another between the eighth and ninth; and that these opening were on a line; that he found another between the sixth and seventh ribs (further toward the back), and another at the lower part of the breastbone. How these openings or holes were made, the witness is unable to form any judgment, inasmuch as decomposition had probably changed their form when he saw them. He also found a small cut on the left side of the neck, about an inch above the collar-bone, not penetrating deeper than the skin; another incised, or cutting wound commencing on the left side of the neck under the ear, and on a line with it, running across the windpipe, opening it in two places. Also a small incised wound across the depression of the lower lip, not through the skin; and another wound across the bridge of the nose, breaking the bones, and depressing them, apparently made with a blunt instrument, about the thickness of a spade. He also found that the front teeth, four above, and four below, had been driven back into the mouth—two still adhering to the gum, and two lying loose upon the tongue.

Dr. Keeley testifies that he was present at an examination on the 16th, and that his observations of the body, and the marks upon it, agree substantially with those stated by Dr. Bailey.

Dr. Howard testifies that he made an examination on the 18th of July, refers to the wounds on the nose and the mouth, and says the blows by which they were inflicted must necessarily have been very severe.

Now were these the remains of one who had lost his life by violence?

The unusual place, and the unusual manner of interment; the mutilation by severance of the limbs, as if to prevent identification, and their separate concealment; the marks upon the body, and manifest evidence of violence about the neck, nose, and mouth; the bloody shirt found in the grave, all bear with great weight upon this question.

If you find that a murder or homicide of any grade was committed, you will next pass to the question, Who was the man so killed? The commonwealth says it was Winfield Scott Goss. Was it?

sumed; on charges of rape, the clothes worn by the female at the time of the alleged outrage, torn and stained, or untorn or unstained, as the case may be,

Winfield Scott Goss resided in the city of Baltimore, and its near vicinity, in the year 1871, and the early part of 1872. He was a brother-in-law of the prisoner. Mr. Barnitz, who knew him intimately, having been employed in the same establishment with him for some years, describes him as about five feet eight to nine inches in height, well-built, with an exceedingly prominent bust, very erect, with shoulders thrown far back, his form full and in every way well developed, with dark eyes, a straight nose, round full face, dark-brown hair a little mixed with gray, prominent forehead, and good teeth. Other witnesses similarly describe him—Mr. Cator saying that his teeth were very fine.

He had procured insurance on his life, in several different companies, to a large amount,—the first policy bearing date the 21st day of May, 1868, and the last the 25th day of January, 1872.

On the night of the 2d of February, 1872, a frame shop, in which it is said he was engaged in gilding pictures-frames, and experimenting with a substitute for india-rubber, was found to be on fire. After it was consumed, or nearly so, the charred and blackened remains of a man were discovered in the cinders, lying near the chimney, which was about the centre of the building. Goss was no more seen in the neighborhood; and on the 22d day of the same month in which the fire occurred, his wife made application to the insurance companies for payment of the sums insured on his life. This being refused, she commenced suits against them, the prisoner appearing as a witness in her behalf.

Were the remains found in the fire those of Goss? If they were, then of course those found in the woods could not be his.

That Goss went to the building some time during the day preceding the fire is clear. Joseph Loudenslayer (the comments on whose testimony you will remember) says he saw Goss, in company with the prisoner, start on the afternoon of that day from the city, for this building; that they took with them a box four to five feet long, about fifteen inches in depth and width, containing, as the prisoner alleged, machinery for Goss's laboratory. Lewis Engle testifies that the prisoner and Gottlieb Engle came to his father's house (a short distance from the shop), after dark, saying the lamp at the shop had

afford a strong presumption for or against the charge. But physical coincidences and dissimilarities, often of a most singular kind, frequently lead to the discovery gone out, and desiring another to take over; that they did not start back immediately, but (in the language of the witness) "stopped about the house after the lamp was ready;" and while still there, the prisoner went to the door to empty a tumbler or dipper, from which he had been drinking, saw the fire, and gave the alarm; that he, the witness, the prisoner, and Gottlieb, ran over—the prisoner and Gottlieb falling a little behind; that when he reached the shop it was in flames, and not long after the roof and upper part fell in; that he saw no attempt to enter the building, or arrest the fire; that he heard no suggestion that any one might be inside, until the building was burned nearly down, when the prisoner came and requested him to go to Baltimore, and inform Goss's family of the fire, and that Goss was missing. Sarah Moore (the colored woman called by the defense) testifies that she was living at the time of the fire one hundred yards from the shop; that having occasion to go to her door, she saw Goss outside the shop, with a light in his hand; that it was dark, and she did not see him in front, but observed his side-face as he passed in, and heard him lock the door; that she then sat down to her supper, and soon after finishing it, discovered the shop to be on fire.

Mr. Smith testifies that he reached the fire when the building was all in flames; that he heard Mr. Cator complaining to the prisoner for not giving the alarm before the fire had gotten so far, if he supposed anybody to be within the building, asking him if he desired to create a false alarm by saying that Goss's body was in the flames, and that the prisoner replied he was unacquainted with anybody about the place.

The witness says he then went nearer the fire, and procuring the assistance of Martin Quinn, found a body, and succeeded in dragging it out of the flames; seeing the prisoner again in the crowd he asked him if he was going to leave the corpse there like that of a dog, while claiming it to be the remains of his brother, upon which the prisoner turned his back and made a noise as if crying. The corpse was then placed in a box, and taken to Mr. Lowndes's stables, where it was left for the night. The next morning, this witness says, he went to the scene of the fire as early as it was light enough to see, and sought among the ashes for Goss's watch and ring,



of the perpetrators of offenses, or establish the innocence of parties wrongly accused. Several instances of the former are given in Starkie on Evidence. (*x*)

(*x*) 1 Stark. Ev. 562, 3rd ed.; 844, 4th ed.

finding nothing but a melted bottle, part of the door hinge, and a few small bones.

From the body the hands and feet were off; the skin was burned crisp, and blackened; identification by means of the features and expression was impossible. Mrs. Goss testified that the corpse was brought home in the evening of the day following the fire; that she identified it as that of her husband. She says, however, she judged only by the size and shape of the head, the neck, and body; that in these respects it resembled him. This, it must be observed, falls short of identification—which can only result from observing some mark by which the individual may be known, or the peculiar expression formed by the features of the face. Mr. Arden, the step-father of Mrs. Goss, who saw the corpse, also testifies that he observed the same resemblance to Goss in the head, neck, and body. Mrs. Arden, the mother of Mrs. Goss, says the body could not be recognized, by reason of its condition, but that the shape of the head and body resembled those of Goss. Mr. Smith, before referred to, says the body when taken from the fire by him was not susceptible of recognition; but that, for the reasons which he states, the thought occurred to his mind that it was the body of a female. Dr. Howard, however, dispels this suspicion. He testifies that about one year after the fire he made a careful examination of this body and found it to be that of a man, of about five feet eight to ten inches in height, with full chest, and shoulders thrown back.

This witness further says, that upon a critical examination of the mouth, he found that one half the teeth had been lost many months, at least before death—two of them directly in front, one being from the upper and the other from the lower jaw. This latter statement is important when considered in connection with that of the witnesses who have described Goss's teeth as regular and fine.

On the day preceding the fire it is testified that Goss drew out of bank the balance standing in his favor, and his account there closed.

We now repeat the question: Was this his body found in the fire? If the inquiry stopped here it might be unsafe to

Thus, in a case of burglary,—where the thief gained admittance into the house by opening a window with a penknife, which was broken in the attempt,—part of conclude that it was not. But it does not stop here; there is other evidence bearing upon the question, of a highly important character. On the 22d day of June following the fire, and while the suits referred to were pending, a man presented himself at the house of David Mullin, in Coopertown, asking to remain as a boarder, and giving his name as A. C. Wilson. Mr. Mullin says he remained until the 16th day of the next November, when he left for Athensville, about two miles distant. Here he remained one week, and then left, appearing at Mrs. Toombs's boarding-house, in Newark, on November 29th, where he remained nearly seven months. The witnesses who saw this man at Coopertown and in Newark, describe him as stoutly built, five feet eight to nine inches in height, full chested, shoulders thrown back, with dark-brown hair a little mixed with gray, good teeth, full broad forehead, and having when in Newark moustache and side whiskers. The witnesses do not all precisely agree in describing his features, but unite as regards his general appearance, and in saying that his face was fine.

Several witnesses also state that he had a habit of drinking to excess, as Goss is said to have had

These witnesses further testify that he carried on some correspondence with Baltimore, where Goss had resided—sending letters and packages, and receiving others in return. One witness, Michael Olrey, being acquainted in Baltimore, testified that he conversed with Wilson about mutual acquaintances residing there.

It is clear he knew the prisoner, for he received a visit from him while at Newark.

A pair of pantaloons, which several witnesses recognized as Wilson's—left behind when quitting Newark—have been exhibited. They are darned in the seat, and are thus identified. Mrs. Toombs says she noticed that they were very short for him. Lewis Engle testifies that when Goss boarded in his father's family, near Baltimore, during the summer or fall preceding the fire, he had such a pair of pantaloons as those exhibited; says he, the witness, assisted Mrs. Goss to wash them, that he noticed the color, the cord on the side of the leg, and also observed that they were short for Goss when worn

It is further shown that this man wore a large blood-stone

the blade was left sticking in the window frame, and a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the ring, such, in general appearance, as the one exhibited here. Some of the witnesses testify that they recognize this as the same. Engle testifies that Goss had a similar ring, being in all respects like this; that he, the witness, wore it sometimes and that he believed this to be the same; while Mrs. Goss, who describes her husband's ring as being of about the same size and of the same general appearance as this, says it was, according to her recollection, in some respects different. Whether it is possible for any of the witnesses to recognize the ring fully, so as to swear to its identity, is for you to determine. It would seem to the court safer to conclude that the ring worn by Goss at Engle's, and that seen on the man known as Wilson, were alike in size, shape, material, and general appearance.

A frock coat is produced which Mrs. Toombs identifies as a coat worn by Wilson, and left behind when quitting her house. On this coat being exhibited to Mr. Heins, a tailor residing in Baltimore, he testifies that he made one in all respects like it, being of precisely the same measure, for Goss; that while he cannot describe to you how he recognizes his own work upon this coat, he tells you that he believes he does.

It is shown by several witnesses that Goss, while in Baltimore, had in his possession what is called a double ratchet screw-driver, very peculiar in its construction, and claimed to be his own invention. It is further shown that the man calling himself Wilson had a wooden model of this same screw-driver, which he claimed to have invented.

Lewis Engle testifies that when Goss boarded at their house, near Baltimore, he saw him and Udderzook a good deal together, and that Goss frequently called Udderzook "Doctor." Several of the witnesses who saw Udderzook and the man called Wilson together at Newark, testify that Wilson called Udderzook "Doc." The significance of the last two mentioned circumstances cannot be overlooked.

And now, following this evidence, designated to show similarity, in person and apparel, in the habit of intemperance, possession of the screw-driver, and in the appellation or title used when addressing Udderzook, the commonwealth has undertaken to prove the actual identity of Wilson as Goss, by exhibiting the photograph of Goss to the witnesses who were

prisoner. So, where a man was found killed by a pistol-shot, and the wadding in the wound consisted of part of a ballad, the corresponding part of which familiar with Wilson, some of them having been his room-mates in the boarding-house. Were it possible to produce Goss himself before these witnesses, as he appeared in life, they could tell us, doubtless, whether he is the same man who was known to them as Wilson; and their judgment should be the highest and best source of information on the subject. As Goss cannot be so produced, probably the next best means of judging of his identity with Wilson is obtained by producing his photograph (if it be a perfect one), and allowing these witnesses, who were familiar with Wilson, to base their judgment on it. The picture is of course a much less satisfactory means of judging than the presence of the individual would be; because it shows the face in a state of repose, not very frequently observed in the individual; and showing it on a much smaller scale, the expression is less distinct. Still, where a photograph is perfect, it shows an exact likeness to the extent presented, and can generally be recognized with great ease by those familiarly acquainted with the individual. The photograph exhibited here is shown to be that of Goss. Some of the witnesses who knew the man called Wilson, say this looks like him; that the shape of the forehead and face is like his, but they do not recognize the picture. Their testimony must not be over-estimated. It goes no further than to show resemblance. Other witnesses, more familiar with this man, particularly some of those who boarded in the same house with him, say they recognize Wilson in the picture; one saying he "sees the man in it;" others "it is him;" and so on, in varied language expressing the same thought.

Too much importance should not be attached to the fact that these witnesses were not able to point out any particular feature by which they recognize the picture as his. If asked to point out the feature or features by which your most intimate friend is distinguished from others, you probably could not do it. Were you to refer to the size of his head, shape of his face, nose, or mouth, you would doubtless find that in all these respects he is not singular. But you recognize him instantly, and with absolute certainty, by his peculiar expression, the combined effect of all his features and his mind. And this you cannot describe, for words will not do it.

In determining the weight to be attached to the testimony of the witnesses, who say they recognize Wilson in the

was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches, was found to correspond with an impression picture, or recognize the picture as his, it is important to remember that when they knew him his beard was different. What effect the change of beard would have on the expression and appearance of the picture, you will judge. You will also bear in mind the comments of the defendant's counsel on this testimony, and the fact that the prisoner's sister, who saw Wilson at Mr. Mullin's, says she does not see any likeness to him in this photograph.

The commonwealth has further undertaken to show that Goss and this man wrote, not only a similar hand, but the same: In this connection Emma Taylor testifies to the receipt of many letters or notes from Wilson, and a knowledge of his handwriting. Two letters—one of them addressed to Mr. Mullins signed A. C. Wilson—being exhibited to her, she says, in her judgment, they are his handwriting. On being shown another letter signed W. S. Goss, and testified by Mr. Butler (as he believes) to be in Goss's handwriting, she says, in her judgment, this is the handwriting of Wilson. This witness, however, as you will remember, did not exhibit such accurate knowledge of Wilson's handwriting as to render her judgment in regard to it very reliable; and what she says should therefore be received with great caution.

John W. Butler testifies that he knew Goss intimately, and corresponded with him some years ago; that he knew his handwriting very well, and believes himself able to recognize it. The letter signed W. S. Goss (before mentioned) being shown him, he answered, "I believe this to be Goss's handwriting." The two letters signed A. C. Wilson (also before mentioned), being shown this witness, he answered that the writing, in his judgment, was that of Goss. The signature of A. C. Wilson, on the register of the Central Hotel in Philadelphia, under date of —, being shown the witness, he answered that he would take this to be written by Goss, as also the signature on the register of the William Penn Hotel, though in respect to these single signatures his judgment is less distinct than that expressed in regard to the letters. The intelligence manifested by this witness, as well as the caution observed in expressing his judgment, should be considered in estimating the value of his testimony.

Franklin Mills testified that he knew the man called Wilson, and upon one occasion, when sitting at his side, discov-

made in the soil, close to the place where the murdered body lay. In a case of robbery, the prosecutor, when attacked, struck the robber on the face with a ered a small scar running up into his hair on the side of his forehead—that he had never noticed it before. Mrs. Goss testified that her husband had no scar upon him. You have heard the comments of counsel in respect to this, and will determine what weight the contradiction should have,—but in doing so will remember that Mr. Mills speaks of the man more than a year after Mrs. Goss had last seen her husband.

Now was this man, called Wilson at Coopertown and Newark, Winfield Scott Goss, under an assumed name?

If he was, you will judge whether the conclusion is not reasonable, that he had entered into a scheme to obtain money fraudulently from the insurance companies; and that the burning of his shop was a part of this scheme. If you reach this conclusion, a reason will be found for his appearance in Pennsylvania and New Jersey under an assumed name. Still if you find this man was Goss under an assumed name, you will have made but a step towards finding that the remains discovered in the woods were his.

But now (if this was Goss) we find him in Newark on the evening of the 25th day of June, sixteen days preceding the discovery in the woods. He then started for Philadelphia. Mrs. Toombs testifies that three days later, he wrote to her from Philadelphia, under date of the 28th. Francis Jacobs testifies that he is clerk and bar-tender at the William Penn Hotel, in Philadelphia; that in the forenoon of the 26th (the day after this man left Mrs. Tombs) a man came to the hotel, representing himself to be A. C. Wilson, and registering this as his name. The witness describes him, and being shown the photograph exhibited here, says it looks like this man. He is unable to describe any other stranger who called about that time or since, and says he did not recognize the resemblance in the photograph until told whose it was. You will judge whether this witness can truly describe the man as he undertakes to do, and whether he does see the resemblance in the picture to which he testifies. That a man came to the hotel representing himself to be A. C. Wilson, that the witness saw him register his name, that he stayed till the next day, that the prisoner visited him, occupying the same room, and went away with him, the witness is positive. The register is produced, and the name of A. C. Wilson appears upon it; and this signature, as we have seen, Mr. Butler expressed the

key, and a mark of a key with corresponding wards was visible on the face of the prisoner. Mascardus also relates an instance, where an inclosed ground set judgment is in the handwriting of Goss. If the witness is believed, it was on the morning of the 27th that the prisoner and this man left the William Penn. Where they went at that time does not appear.

On the evening of the following day, the prisoner was seen upon the train at Wilmington, by Mr. Hodgson, who rode with him to Philadelphia. (We do not observe any conflict between the testimony of Mr. Hodgson and that of Mr. Jacobs, because we do not see any inconsistency between the facts to which they speak.) Two days later, Francis Pyle, who lives near West Grove, in this county, testifies that the prisoner, in company with another man, came to his place. He says he had known the prisoner formerly, and recognized him. Mrs. Pyle and the little boy Elmer Pyle, also saw the men there, and say they recognize the prisoner as one of them. Mr. Pyle and the boy describe the appearance and parts of the dress of the other, referring to his build, his whiskers and moustache. Mrs. Pyle saw but little of him and was not very near. Mr. Pyle says he wore gaiters like those shown here, and had a ring on his finger. Upon being shown the photograph, he says it looks like a picture of this man. The son also, in addition to the general description, says this man wore gaiters; had eye-glasses, and that when they were together under the cherry tree, he called the prisoner "Doctor." This last circumstance, if true, is very significant, for as we have seen (if the witnesses are believed), *this* is the same appellation by which Goss in Baltimore, and the man calling himself Wilson in Newark, addressed Udderzook.

From Mr. Pyle's place these men went in the direction of Jennerville. In the evening of the same day, Mr. Jefferis, Mrs. Jefferis, and Mr. Townley, testify that the prisoner, with another man, appeared at the hotel of Mr. Jefferis, in Jenner-ville. These witnesses recognize the prisoner, as does also Mr. Wallace, who saw him there, and had known him before. They describe the other man as about five feet eight to nine inches in height, good-looking, full-breasted, straight, with shoulders thrown back, moustache and side whiskers of a dark color; Mrs. Jefferis saying that she, at the time, thought he was the straightest man she had ever seen. On being shown the photograph before referred to, these witnesses also say the picture resembles this man. The next morning, being

with fruit trees was broken into by night, and several fruits eaten, the rinds and fragments of some of which were found lying about. On examining these, it appears the first of June, it is shown (if the testimony is believed) that the prisoner obtained a horse of Mr. Patchell living near by, and visited his brother-in-law, Samuel Rhoades, who resides a short distance from Penningtonville.

Here he was recognized by Mr. Rhoades and his wife, who is the prisoner's sister. They testify that he spoke of the man he had left behind at Jennerville, and Mr. Rhoades says he described him as a man "having no one to look after him, who had been lost for a long time, and was supposed by everybody to be dead, one whom the prisoner had had at Newark or New York (the sound being so much alike that the witness is not certain which), and Philadelphia." The bearing of this description upon the identity of the man left behind is most important. You will judge whether it does or does not describe Goss, and the man known at Newark as Wilson, with great certainty: "Lost for a long time, supposed by everybody to be dead, whom he (the prisoner) had had at Newark or New York, and Philadelphia."

On the evening of the same day, the prisoner having hired a carriage and horse at Penningtonville, went to Jennerville, took the man he had left there in, and started back. When he reached Penningtonville in the night this man was gone, and was no more seen alive. Baer's Woods is by the roadside. Were the remains found there his? The last time seen he was going in that direction. If Mr. Rhoades is believed, the prisoner had contemplated leaving him in the woods somewhere.

When the remains were first uncovered, Mr. Moore testifies that the face was white and natural; says he looked to ascertain whether he could identify it, and believed at the time, and does still, that he could if he had known it. On being shown the picture before referred to, he says it bears a resemblance to that face. This, standing alone, would be of no value, because of its uncertainty. But Mr. Moore and others who saw the remains that evening and the next day, say the upper lip presented the same appearance as the cheeks did where the whiskers came off, on being touched, showing that the man had worn a moustache with side whiskers; that his hair was dark-brown, a little mixed with gray; and Dr. Howard, as well as all the witnesses who examined the remains with care, says the forehead was square and straight,



peared that they had been bitten by a person who had lost two front teeth; and this caused suspicion to fall on a man in the neighborhood, who had lost two front the face fine, chest full, shoulders well thrown back, the person very erect, and teeth regular and good. You will judge whether this is or not an accurate description of the man we have been following.

In the same grave a shirt was found. It is not identified, for there are no marks upon it by which to distinguish it from others. There are many such, as Mr. Crockett testifies, but this witness says he sold a shirt in all respects like this in Newark to a man called Wilson, as he was informed; and Mrs. Toombs testifies that Wilson had such a shirt, showing another point of resemblance.

Then again a pair of Congress gaiters were found upon the feet resembling those worn by the man we have been following. But a more remarkable and striking resemblance still is found in the fact that this man's gaiters were marked No. 8, on the inside, near the top (if Mrs. Toombs is believed, of which you will judge), and had recently (as Mr. Saurin testifies) been half-soled; and that the gaiters found on these remains exhibit a similar number, in the same place, and a similar condition in respect to the soles.

Now you will determine whether these are the remains of the man we have been following. If they are, and this man was Goss, then did the prisoner take his life?

In starting upon this inquiry the first thought that presents itself is, had the prisoner any motive to commit the crime?

If the remains are those of Goss, you will judge, as before remarked, whether he had not entered into a scheme to defraud the insurance companies, by hiding himself from the world, and endeavoring to create the belief that he was dead. And if he had entered into such a scheme, you will further judge whether the conclusion is or is not reasonable that the prisoner had also entered into it. For it would follow that while Goss was thus alive under an assumed name, and while the prisoner knew this, for (according to the testimony as we have seen) he visited him at Newark on the 11th of May, he appeared as a witness on the 28th day of the same month to prove his death, not, it is true, by swearing directly that he was dead, but by swearing to circumstances from which he sought to create that impression. If it is true that the prisoner had united in such a scheme, it was very important to him that the existence of Goss should not come to light; for if it

teeth, and who, on being taxed with the theft, confessed his guilt. (y) In some cases, also, the fact of the accused being left-handed becomes an adminiculum

(y) Mascar. de Prob. Quæst. 8, ii. 28.

did, not only would the scheme fail, but the prisoner become liable to prosecution for conspiracy and perjury. And if you find such motive for the concealment of Goss existed, you will judge whether his disappearance from the neighborhood in which he was known, and his reported death, did not invite to the commission of the crime here charged, by reason of the immunity from discovery which these circumstances tended to afford.

Still a motive to commit the crime, and such opportunity to gratify it, would be of no consequence, in the absence of evidence that the prisoner did commit it. Then what is the evidence that he did?

If the remains found in the woods are those of the man we have been following, and that man was Goss, then we have found the prisoner and Goss together on the first day of July. On the evening of this day, as we have seen, the prisoner visited his brother-in-law, Samuel Rhodes, whose testimony I will now turn to and read: "The prisoner came down to where I was at work between one and two o'clock; he said it was warm; he had written me a letter, and as soon as I saw him I thought of the letter; as soon as I saw him I asked him about that letter; after he spoke to me, I said I wrote back in answer to his letter to know what it was, and that I got no answer. No, he said, I couldn't write any more, and it had to be by word of mouth; however, he says, it is just as good now, and better, if anything; he says it is a sure thing for \$1,000 apiece. He then said, it is warm; let us go up to the shade; we walked up and sat down along the edge of the field in the shade, and I asked him what it was; he says, have you got a horse? I said yes; he says, have you got a wagon that will hold three? I said yes; I believe I said I had no carriage, but I could get one; I asked him when we would get the money, he spoke and wrote of; he says we will get \$500 apiece, right away; he said there was more money we would get; he began to say something about it and stopped; he said he would guarantee me \$1,000 anyhow; I asked him what it was; he said it was a man that was drinking and spending his money for no good; he said he had the "poker" two or three times since he had been with him; he said he had about

of evidence against him, *i. e.* when surrounding circumstances show that the offense must have been perpetrated by a left-handed person. (2) Few things have

(2) See the Case of William Richardson, Case, Beck, Med. Jurispr. 583, 7th ed. Appendix, No. I.; and Patch's

\$1,000 with him, he was certain, for he had been drawing his money through him; he wanted me to hitch up and go right with him to Jennerville, and get this man in and take him to the woods; and he would give him a little laudanum, and put him to sleep and take his money. Says I, I can't go on that. I told him if he commenced that he would ruin himself and his whole family; he said there is not a bit of danger; he had had this man, he said, to New York or Newark (am not certain which, they sound so much alike), and to Philadelphia; and I wouldn't go to all that trouble unless I knew what I was doing; I told him nobody knew what they were doing when they began that kind of business; I told him he would have to give up the idea; he says, I will not go home until I get it; he says, I will do the stealing, and spoke as though he wanted me to hide the money; he said if I wouldn't have anything to do with it, as he had been at a great trouble and expense, he would do it himself and bury the money; I told him not to, and that I must go to work; I told him to stay a day or two and I could talk to him in the evening, and in the morning, until the hay was fit to work; he said the man would not stay at Jennerville by himself, and if he (Udderzook) stayed he would have to bring the man up, and asked me if he might; I told him he should; he then asked me for my horse to bring the man up; I told him I could not give him my horse, as he was at Warner's; he asked if there was a livery stable at Penningtonville; I told him there was, and he could get a team there; he says, the man is very sick; he said he thought he would have died last night, or the other night, I don't know which; that he dosed him with whiskey; he says, I believe he will die, and how would it be with you and Annie if he should die at your place? would you allow me to put him away, and say nothing about it? I said no, if a stranger would die at my place there would have to be a coroner got, and an inquest held; he said there was nobody to look after this man; he said he had been lost for a long time, and everybody thought he was dead; he had no friend that would look after him, or care anything about him; I told him it didn't make any difference; if a stranger died there, there would have to be an inquest: he throwed his head down,

led to the detection of more forgeries than the Anno Domini water-mark on paper; and in one old case a criminal design was detected, by a letter purporting to his cheek appeared to get red, and he said, that might lead to some suspicion; I told him I couldn't help it; I couldn't have anything of that kind; he says, well what then? I told him I could not tell him any more until I saw the man; he started off towards Penningtonville with my wife."

This witness and his testimony have been criticised by counsel, and you will determine what weight his statements should receive. In this connection it is important to remember that he exhibited the prisoner's letter, referred to, soon after it was received, and reported to his neighbors the interview, detailed here, almost immediately upon its occurrence. You will also remember the testimony heard respecting his character for truth-telling; and will examine the prisoner's letter, to see whether it does or does not corroborate his statements. That letter appears by the envelope to have been forwarded in the preceding December, and Mr. Rhoades testifies that it was received at that time. It is in the following words:

"FRIEND SAM: I have something of importance that must be done by word of mouth. Please don't let anyone know of our communications, but as soon as you read this mount your horse and come to Oxford; take the morning train to Baltimore. When you come to Baltimore inquire for Decker & Brothers' planing and saw-mill. This mill is right across the street from where you get out of the cars. I am employed in the said mill, and am there every day. You will arrive at one o'clock; you must take the next train for Oxford, which is at 2.30, that will give us one hour and a half, which will be sufficient for us to arrange one of the finest plans that you have heard of. There is a cool \$1,000 in it, and there is nothing to prevent us from getting it. This is without a doubt. Do not buy your ticket at Oxford, but pay your fare on the car. Do not let a soul know where you go. I cannot explain further until I see you. Do not fail to come. Drop everything at once. You can make the trip in a few hours. I have no person in confidence with me, and I now propose to take you; you will find that it is the best day's work that you ever did. I will give you full explanation when I see you. (Bring the letter with you.) Your expenses will only be \$4.00 or a little less.      "Very respectfully,      WM. E. UDDERZOOK.

"Be firm, be true."

have come from Venice, being written on paper made in England. (a)

Strong, however, as coincidences and dissimilarity

(a) Moore, 817.

On the evening of the same day, after the interview with Rhoades, as night was coming on, the prisoner started, with the man by his side, in the direction of Penningtonville. Baer's Woods is about nine miles from the place of starting, and in this direction the parties were going when last seen. John Hurley, who lives within a short distance of the woods, testifies that his wife in the night aroused him to hear a noise in that direction. That he distinctly heard hallooing, and distinguished the voices of two individuals, but could not distinguish any expression except the exclamation "Oh!" That about daylight the following morning he discovered smoke arising from a fire in the woods. And several other witnesses testify to having seen fire in the woods on that morning..

It is further shown that about twelve o'clock the same night, the prisoner returned the vehicle to the stable at Penningtonville. The iron supporting the dasher on the left side, where the man was sitting when last seen, was broken, and the leather bent forward; two of the bows supporting the top, on the same side, were broken from the bed, and swinging loose. The oil-cloth that had covered the floor was torn out and gone; the blanket and sheet that accompanied the wagon were missing. What had become of them? Had they been stained with blood and consumed in the fire? After the discovery of the body the floor of the wagon was examined, and red spots, apparently made by blood, were observable on the edges of the boards forming the bottom, and underneath where it appeared to have spread. Dr. Howard testifies that having applied microscopic and analytical tests to these spots, he ascertained them to be made by blood.

Now, if the remains found in the woods are those of the man who started with the prisoner from Jennerville, you will judge whether the prisoner did or did not carry out the design which Rhoades says he expressed in the interview, a few hours previous; whether the hallooing testified to by Hurley as heard that night did not come from this man; and whether the smoke seen did not issue from a fire that consumed the bloody garments (as well of the perpetrator as of the victim), and other evidences of the crime.

Where the prisoner spent the balance of the night after

ties of this nature undoubtedly are we must be careful not to attribute to them, when standing alone, a conclusive effect in all cases. Just let it be remembered, returning the vehicle does not appear. He was seen early the next morning entering Cochranville on foot. Later in the day he was met, still on foot, going in the direction of Jennerville. On the evening of the same day, about six o'clock, he appeared at Penn Station, on the Philadelphia and Baltimore Central Railroad, where he took the train East, getting off again at West Grove—this being the point at which he and his former companion had (according to his own statement) left the train two days before. In a short time he reappeared, carrying a carpet-bag and valise, and entered the train going westward. At Penn Station he left it, and passed in the direction of Mr. Miller's, where his mother resided. On the next day—being the third of July—he took the train for Baltimore.

When arrested he made a statement which you have heard ; and you will judge whether it is consistent with probabilities, or finds countenance in any ascertained fact in the cause.

We now repeat the questions before stated : First, were the remains found in Baer's Woods those of Winfield Scott Goss ? Second (if they were), did the prisoner at the bar take his, Goss's life ? Both these questions must be found against the prisoner before he can be convicted. In passing upon them, you will carefully weigh all the evidence, as well as the comments of counsel upon it ; and will also consider the testimony which the prisoner has produced in regard to his former character.

If you convict him you must determine the grade of his crime. That it is murder, if he is guilty at all, has not been questioned by his counsel. But in Pennsylvania the legislature, considering the difference in guilt where a deliberate intention to kill exists, and where no such intention appears, has distinguished murder into two degrees—murder of the first, and murder of the second degree ; and required the jury trying the accused, if it finds him guilty, to ascertain and find by their verdict whether it be murder of the first, or murder of the second degree. So it is further provided that "murder which shall be perpetrated by means of poison or lying in wait, or by any other kind of willful, deliberate, and premeditated killing, shall be deemed murder of the first degree ; and all other kinds of murder shall be deemed murder of the second degree."

that the men who were found in possession of the broken knife, and the fragment of the ballad (the latter especially), might have picked them up, where

Then if the defendant is guilty, is it of murder of the first, or murder of the second degree?

If the prisoner killed Goss, you will determine whether it is not plain that the crime was contemplated beforehand, and the killing willful and deliberate. The circumstances bearing upon this question have been so fully stated, in treating other parts of the cause, and must be so distinctly present in your minds, that we need not repeat them here.

Still this question is for you alone to determine, and if you convict the prisoner you must say whether it is of murder in the first or second degree.

In conclusion, we urge upon you to bear constantly in mind the great importance of the cause. To the prisoner it involves everything of earthly desire. You will therefore give to the facts not only their most reasonable construction, but also their most charitable and merciful construction; and if, when thus considered, they fail to satisfy you of his guilt, you will acquit him, regardless of all consequences. And he is entitled to the benefit of every doubt. A doubt, however, is not a mere possibility that the prisoner may not be guilty, but an honest hesitation of the mind arising from the proof.

If, on the other hand, the facts satisfy you of his guilt, you must convict him. In such case no consideration of pity or mercy can influence you. To the tender appeal made by the presence of wife and children, you must turn a deaf ear. To listen to it would be more than a mistake; it would be a crime—a crime against the innocent, against society. With the consequence which may attend conviction, you have nothing to do; they rest upon others. If the evidence satisfies your minds of his guilt, you have no choice. Following the pathway of the evidence, you can turn neither to the right nor to the left, but must accept the conclusion to which the facts lead. If you entertain views unfavorable to capital punishment, you must disregard them here, remembering that it is not the jury, but the law, that inflicts the punishment. The jury does not pronounce the sentence which condemns to death: it simply determines whether the prisoner has committed the crime.

You will now take the case, and forgetting everything but the law, the evidence, and your duty, will pass an honest,

they had been thrown by the real criminals; that the person, the print of whose knee was visible on the soil near the murdered corpse, might have been a deliberate, and fearless judgment between the commonwealth and the prisoner.

Said the supreme court (Agnew, C. J.), in affirming the conviction on error: "The great question in the case was the identity of A. C. Wilson as W. S. Goss. This was established by a variety of circumstances and many witnesses, leaving no doubt that Goss and Wilson were the same person, and that the body found in Baer's Woods was that of Goss. All the bills of exception except one relate to this question of identity, the most material being those relating to the use of a photograph of Goss. Many objections were made to the use of this photograph, the chief being to the use of it to identify Wilson as Goss, the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait or miniature painted from life, and proved to resemble the person, may be used to identify him, can not be doubted, though, like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph proved to be taken from life, and to resemble the person photographed, should not fill the same measure of evidence. Letters from Wilson, identified as the handwriting of Goss; a peculiar ring belonging to Goss, worn upon the finger of Wilson; the recognition by Wilson of A. C. Goss as his brother; packages addressed to A. C. Goss, and envelopes bearing the marks of the firm with which W. S. Goss had been employed, coming and going to and from Baltimore, and many other circumstances following up the man Wilson, leave no doubt of his identity as Goss, independently of the photograph. The objection to the proof of Goss's habits of intoxication is equally untenable. True, the habit is common to many, and alone would have little weight; but habits are a means of identification, though with strength in proportion to their peculiarity. The weight of the habit was a matter for the jury. It is unnecessary to follow the bill of exceptions in detail. They all relate to facts and circumstances as to the question of identity. If the bills of exception are many, they only denote that the circumstances were numerous, and in this multiplication consists the strength of the proof. They are many links in a chain so long that it encircles the prisoner in a double fold. The questions put to G. P. Moore, A. H. Barintz, and A. R. Carter were unobjec



passer by who knelt down to see if life were really extinct, or to render assistance to the sufferer; that the having lost front teeth, or being left-handed, are tionable. Whether they really would not identify the dark and swollen face of the corpse, it was not for the court to decide. The weight belonged to the jury. There was no error in permitting the jury, after their return into the court for further instructions, to take out with them, at their own request, the teller's check, due bill, and applications for insurance papers, which had been proven, read in evidence, and commented on in the trial. The appearance, contents, and handwriting of these documents were no doubt important to be inspected by the jury, who could not be expected to carry all these features in their minds. It is customary in murder cases to permit the jury to take out for their examination the clothing worn by the deceased, exhibiting its condition, the rents made in it, the instrument of death, and all things proved and given in evidence bearing on the commission of the offense."

The case of Professor John W. Webster who was arraigned in Boston, February 10th, 1847, for the murder of Doctor George Parkman, was a case of purely circumstantial evidence. Chief Justice Shaw charged the jury as follows:

Gentlemen: I rise with the deepest sense of the responsibility which presses upon this tribunal. You have been so long engaged in this important case, that I cannot detain you much longer in suspense. I shall not at this late period, keep you long confined in considering the facts which have been so fully laid before you, and it is mainly a question of facts. I shall rather dwell upon a few plain principles. It is the nature of our laws, under which our lives are secured, to distribute to the several organs of government each its several department of duties, and each is responsible for his own. We are not here to make the laws, but to execute them. This indictment charges the prisoner at the bar with murder. Murder is the highest species of homicide. Homicide is a general term, including several degrees; some of which are justifiable, such as those committed in justifiable war, or by the officers of justice, with proper warrants; but I need not dwell on them. The statute law only provides that willful murder shall be punished by death; but that is not the only law in force among us. We have the common law. The common law was received by our ancestors from England, but is really as much in force

not very uncommon, add to which, that some persons are what is called "ambidextrous," *i. e.* can use both hands with equal facility ; (*b*) that the Anno Domini

(*b*) Tayl. Med. Jurisp. 230, 3rd ed.

among us as any other, and may be called the common law of Massachusetts. [The learned Chief Justice read from a memorandum of his own on the nature of malice.] In murder, to escape the imputation of malice, the prisoner must prove the provocation, the accident, or any other circumstance which goes to preclude the malice—otherwise it is argued from the act itself. No provocation of words, however opprobrious, will mitigate the motive for a mortal blow, or one intended to produce death, so as to make it manslaughter, where there is an intention to kill. If there is sufficient provocation, it is manslaughter ; but words are not a sufficient provocation. [The Chief Justice read some authorities from East's Crown Laws.] Malice is implied from any deliberate, cruel act against another, however sudden. When there is a blow of a deadly or dangerous weapon, with intent to do some great bodily harm, and death ensues, malice is presumed. If a man, provoked by a blow, with a feeling of resentment returns it, and kills his aggressor, it is not excusable ; but it is a less crime than murder ; it is manslaughter, with heat of blood. We see no evidence in this case of any provocation or heat of blood. There were angry feelings, but they do not amount to a provocation or a heat of the blood sufficient to render the crime manslaughter. The purpose of a coroner's inquest is to find how the dead body came to its death. There is no distinction, in the eye of the law, between persons, whether it be a colored pauper in a county alms-house, or the most distinguished member of the community. The same machinery of further proceedings, in case the jury find that violence was used by some party to produce the death. In this case a charge was made against an individual of having in some way or other produced death. No one saw it done. The evidence is altogether circumstantial, yet it may be sufficient to produce a reasonable conviction. Crimes are secret. There is a necessity of circumstantial evidence, otherwise we could not protect ourselves from crime. Each sort of evidence has its advantages. There is no common standard of comparison. We may often arrive at as sure a conviction by circumstantial as by positive evidence. The inference from the facts should be a natural or a necessary one, and

water-mark on paper is by no means infallible, the year being often anticipated by the manufacturer ; (c) that in the present age of the world at least, a person

(c) Wills, Circ. Ev. 29 and 114, 3rd ed.

each fact should be proved by itself. Suppose in the present case the teeth are found to be those made for Dr. Parkman before his death ; that fact is itself sufficient to establish the conclusion that the remains are his, if no other facts are found repugnant to this. The allegation is that he entered the Medical College about two o'clock, and never came out of it alive. Search was made during the week. The next Friday human remains were found under the Medical College. The place was taken possession of by the police. Investigations were made, and the remains were declared to be those of Dr. Parkman. Is this proved ? It is proved that he disappeared from his home on Friday forenoon, and did not come back to dinner, and never came back ; this is established. Has it been proved that he was seen anywhere after the hour he is said to have entered the college ? As to the testimony of Mrs. Hatch, Mr. Thompson, Mr. Wentworth, Mr. Cleland, Mrs. Rhoades and her daughter, and Mrs. Greenough, I need not comment particularly. It is to be compared with the proof on the other side. When such a great event happens, the whole community is thrown into a committee of inquisition, and a large number of lines of inquiry are instituted ; a great many persons are found who have seen the object of the search. It became known on Saturday evening that Dr. Parkman, a man known to almost everybody, had disappeared. The whole community were put upon their recollections, and would it be strange if a great many had seen him, and yet have been mistaken ? If they had not been mistaken, would not others be found when all were intent, who would testify that they saw him also ? This negative evidence, it is true, is not conclusive in itself, but it goes to destroy the positive evidence, for we can hardly conceive that if there had been no mistake in those who saw him as to his identity or the time, a great many others would not also have seen him, and would not have recollected it the next day. If Dr. Parkman went to the college at the invitation of Dr. Webster, and was there killed by him, all question of implied malice is put out of the question, for it was done by express malice. Dr. Webster admits that Dr. Parkman came there, and, as he says, he paid him money. It is in

writing at Venice on a sheet of paper brought or imported from England, is scarcely improbable; and that even the impression made on the face by the key, evidence that Webster stayed there that afternoon, and left there about 6 o'clock. In so much as Dr. Parkman has never been seen since that afternoon, if it shall appear that the remains found in the apartments of Dr. Webster were identified as his body, the alibi is of no consequence. In a recent case in Richmond a man was stabbed with a knife; a man was arrested who had a knife in his possession the day before; the handle of the knife was found broken off near the deceased. It was sworn to be that which belonged to the prisoner the day before; and on a post mortem examination, a blade was found, which by the scratched edges of the broken steel, tallied with that of the handle. This circumstance was allowed a great weight. When a circumstance of this kind is established, then the absence of any testimony to the contrary—the proof of concurrent circumstances—has a strong tendency to strengthen the conclusion. When a party has attempted to suppress proofs, the circumstance acts to prove a consciousness of guilt. When we apply these principles to a case, certain rules are to be applied. First, the circumstances upon which the conclusion depends are to be fully proved; all must connect together; no one must be inconsistent with an act of this nature or alibi. An alibi means elsewhere. If a man is charged with being in one place, and he can prove himself in another at that time, then he must escape. This is a mode of defense which easily suggests itself, and may be secured by a little contrivance. Third, the circumstances must not only limit the guilt of the party, but they must be such as to exclude every other reasonable hypothesis. They must exclude all reasonable doubt. What is a reasonable doubt? it must be more than a probability. The facts must be such as to implicate the defendant also. We must now, gentlemen apply these to the present case. The indictment charges J. W. Webster with the murder of Dr. George Parkman, on the 23rd of November last. The indictment has been referred to by the defense, and we have taken the matter into consideration. It is the rule of law that the means and manner of the crime shall be set forth, so that the prisoner may prepare for his defense; yet if death is produced in some new mode, the law will not let the criminal escape. It has general rules which provide for new cases. The last count sets forth that the prisoner assaulted and killed George Parkman, in some

might have been caused by a blow from the same or a similar key at some other time, (*d'*) or might possibly be a natural mark. An excellent instance of how

(*d*) Goodeve, Evid. 29.

manner or by some weapon unknown to the jury, The court are of opinion that this is a good count. Dr. Parkman may have been assaulted with chloroform or ether, which stupefied and made him insensible, and then death would have been caused by weapons to the jury unknown; and the jury were only bound to set forth all they knew. That is necessary to be proved. First, it is necessary to prove the *corpus delicti*, or the killing so as to exclude suicide or accident. Dr. Parkman was in good health, as appears by Mr. Shaw, that morning. We come now to the teeth. These are the principal signs of identification. That the other parts of the body did not differ in any material respect from Parkman's, proves little in itself, but becomes very important, if it is made out that the teeth were his. It is a serious inquiry, whether by the correspondence of the teeth to the mould, the identity can be made out. We must rely only on the evidence of those who have made this subject their study. Dr. Keep identified these teeth without hesitation, pronounced them Dr. Parkman's, and he has explained to you the reasons which confirm him in that opinion. You have also heard the testimony of Dr. Noble to the same effect. Dr. Morton is of opinion that the characteristics of teeth are not such as to enable a dentist to identify his work, under such circumstances, with certainty. Three other eminent dentists have been called, who are of a different opinion, and confirm Dr. Keep. This evidence is, undoubtedly, to be received with care. It is of the same nature of that which is applied to fossil remains, and by means of which a single bone is made to lead to the discovery of an entire animal of an extinct species. You must be judges of it in this case. If these are the teeth of Dr. Parkman, and if, as was stated to you by Dr. Keep, their condition proves that they were put into the furnace in the head, and the whole body, no part of it being dissimilar to Dr. Parkman's, and if the suppositions of suicide and accidental death are excluded, the *corpus delicti* is established. I shall pass over the testimony of Littlefield. It has been somewhat called in question. But whether much or little weight be given it, it does not materially affect this case. It may be remarked, that, as far as it does affect the case, it is confirmed by other witnesses

closely the propensity to run after coincidences ought to be watched, is presented by the case of one Fitter, who was indicted at the Warwick assizes of 1834, for (particularly the officers of the police). From about Sunday or Monday pretty strict watch was kept of the Medical College till Friday. Nothing important could be transacted here without the knowledge of the police, of Littlefield or Webster. To some of these parties the existence and condition of these remains, found partly under the privy, in the tea chest, and partly in the furnace, must have been known. You will judge from the evidence by whom. We do not think much can be argued by the conduct of the defendant after his arrest. We have no experience here to guide us. We do not know how we should act in such a case, or how he ought to have acted. To come to the main proof of this case, there are two theories in regard to it. The government takes the one, which supposes that he invited Dr. Parkman to the Medical College, and there slew him, in order to get possession of two notes which he owed to Dr. Parkman, and that he got possession of them. Dr. Parkman had loaned to Professor Webster four hundred dollars in 1841. In 1846 several parties contributed to another loan, to relieve him, to the amount of two thousand four hundred and thirty dollars; to this Dr. Parkman contributed five hundred, and the three hundred and thirty-two dollars on the old note; and other parties the balance. Dr. Parkman held the large notes and the mortgage on personal property, for its security, for the benefit of himself and the other parties, and also the old note, which was to be given up whenever his share was paid. It appears that the defendant was in possession of both notes, and the government contends that he never paid either; that he invited Dr. Parkman to his lecture-room and slew him, to get possession of these notes. If this be proved, it is express malice. The other theory is that of the defense, that being together, the one to pay and the other to receive money, they quarrelled, and Dr. Webster killed Dr. Parkman in sudden heat, and then concealed him to avoid detection. If this be proved, it may be manslaughter. If Dr. Webster did entice Dr. Parkman to the Medical College to get possession of the notes, we can see no difference between it and murder. The government, to strengthen its theory, brings proof that he could not have had money to pay either of the notes; and he has never pretended that he had money to take up the larger one of them. You will judge one very significant fact is, that

the murder of a female. He was a shoemaker; and his leathern apron having on it several circular marks, made by paring away superficial pieces, it was supposed the ninety dollars which was that morning paid to him by Mr. Pette—a check on the Freeman's Bank—was not a part of the money paid, but was on that afternoon or the next day deposited in the Charles River Bank, to his credit. He also told Mr. Pette that morning that he had settled with Dr. Parkman, although Dr. Parkman had not yet called on him. You must judge how far these circumstances go to prove intention to get hold of the notes as a motive of the homicide; and if that was the motive, it is a very strong case of murder by express malice. If, in the hypothesis of the defense, the concealment of the remains was made by another hand, it was of no interest to Dr. Webster, and his reluctance toward the search is to be accounted for, as well as the fact that he did not himself make the discovery which lay directly in his way. Any concealment of evidence going to implicate him, to which a party under suspicion resorts, must go, as far as it goes at all, against him. He has mentioned, that the package to which he referred in his letter to his daughter, was one of nitric acid, and not those notes which have been brought as evidence to prove the intention of the homicide. If so, as far as that goes, it goes to obliterate the effect of attempted concealment of evidence. But it does not at all affect the case or the bearing of these notes when found, or the *animus* or intention of the act. The circumstances of the twine used, and many others, which it is needless to mention, go to show, that whoever did any part in the concealment of these remains, did the whole. We think it of much consequence that he waived an examination in the police court. As to the anonymous letters, you must judge of their bearing, if proved. But we must remark, that we consider the proof of them exceedingly slight. Character may be of consequence in a minor case, as of larceny; but when a prisoner is charged with a crime so atrocious, all sink to the same level, and we must rest on the proof of the facts; yet in such a case the prisoner has a right to put in his character, and the testimony is competent evidence. Many other things press upon my mind, but the time reminds me I ought to close. You have been selected by lot, mostly concerned in the active business of life, so as to secure the greatest impartiality. Take sufficient time to deliberate upon your verdict. Use your good judgment and sound conscience, and we are assured the verdict will be a true one.

posed that they had been removed as containing spots of blood; whereas it was satisfactorily proven in his defense, that he had cut them off for plasters for a neighbor. (*e*)

(*e*) Wills, Circ. Ev. 128, 3rd ed.

Second only to the Webster-Parkman case, in importance, upon the question of circumstantial evidence, is the case of *Sturtevant* in the Supreme Court of Massachusetts, 1874. The Judge (Wells,) charged the jury as follows:

In this case, which has been several times noticed in the text, the charge to the jury was given by Wells, J., of the supreme court. For the stenographic notes from which the following is taken the editor is indebted to Mr. Train, the attorney general of the commonwealth:

Mr. Foreman and Gentlemen of the Jury: I congratulate you upon the near approach of the close of this long trial, and there remains but a small duty for me to perform in this case, because they are but few questions which the court are to deal with. It is mainly a simple question of fact. The court is to deal only with the law and its application to the facts; the counsel deal with the facts and argue them to you; and the case has been so conducted throughout, from the beginning of the trial, by the counsel upon both sides, with that conscientious regard to their duty, with that appreciation of the principles of law which apply to the case, that the court have had little to do but sit by and see the trial proceed; and so, in this last stage of it, the argument has been conducted so fairly upon both sides, with such a correct appreciation of the bearing of the law upon the facts, that there is still in this branch of the case but little left for the court. The court, as I say, is to deal only with the law, in its application to the facts and arguments which have been presented, and is not to deal with the facts or the evidence, except so far as to see that the law is rightly applied to the evidence.

It is indeed a responsible office, that which you are to perform, and have been performing through the week in regard to this case. It is a responsibility which you share with the court, with the counsel upon both sides, with the officers, and with the witnesses. None of us are responsible for the results, none of us are responsible for what may happen as the consequence of our proceeding; all of us are responsible that we do that part of it which falls to our lot faithfully, conscien-



It is when taken in connection with other evidence, that physical coincidences and dissimilarities are chiefly valuable ; and then they certainly press with tiously, intelligently, and according to real convictions of duty ; and when we have done that, there is nothing which can attach to us of responsibility beyond. And your duty, gentlemen, is to have listened carefully to the testimony which has been produced before you ; to have made that use of your minds which it is the duty of every intelligent man to make of that intellect and judgment with which he is endowed ; to see that you are free in your minds from every influence that shall warp your judgment, which shall lead you to give undue weight to evidence, or to reject evidence which ought to be considered ; to free your minds from every disturbing influence, whether of fear, of anxiety, of passion, or of prejudice or bias or undue scruple as to the results, whether to the prisoner or to the community ; to free your minds from all considerations of this sort, so that they will, like a magnet upon its pivot, answer to the influence which every fact presented to you shall have upon them, to attract them towards, or repel them from, their conclusions. But when you have taken all the facts in the case, and dealt with them fairly and honestly, as your minds deal with all facts which come before you in the course of your life ; when you have let your minds respond, of its own instincts and impulses, to the weight of those facts, if you find that there results in your minds a conviction of the truth of the main proposition in the case, one way or the other, then your duty remains to declare that result in your minds, without regard to any further consequences.

The charge here is, that this prisoner is guilty of the murder of Simeon Sturtevant. The indictment is a charge of murder, but upon an indictment for murder, where there has been a homicide, if the evidence warrants it, there may be a conviction either of murder or manslaughter. Manslaughter is a homicide, not excusable, not justifiable, but yet not intentional ; a homicide which results from wrong conduct, but not from the cool intent to kill ; from misbehavior, from misconduct which results differently from what the party had reason to expect from the act which was done. A murder is a homicide which had been caused intentionally—intentionally, either from the express purpose to commit the murder, or from a wrongful act of violence, with such means and in such a manner as might reasonably be supposed would cause

fearful weight on a criminal. But if their presence is powerful for conviction, their absence is at least equally powerful for exculpation. Sir Matthew Hale death. There must be in murder what is called "malice;" namely, either a purpose to kill or else a purpose to do an act of violence which might reasonably be supposed would cause death, and which does cause death.

If you find that there has been a murder in this case, it will be necessary for you to go further, and ascertain whether it is murder in the first or second degree. The description in the indictment is the same for either, but the statute provides that murder committed with deliberate, premeditated malice aforethought, or in the commission or attempt to commit any crime punishable with death or imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree. Murder not appearing to be in the first degree is murder in the second degree. You will perceive by the repetition of the language which indicates forethought, that it is the intent of the statute to make murder in the first degree only of those cases where the murder is of such a character as to show a deliberate purpose. But deliberation does not require any considerable length of time. The mind deliberates rapidly, sometimes instantaneously, going from its premises to its conclusions in an instant of time; so that a deliberately premeditated murder with malice aforethought may result from an intent to kill which the mind conceived the instant before the weapon was taken or the blow struck. All the circumstances of the transaction are to be taken into consideration, in order to determine whether it be of this character or not; and upon this question it is competent for you to consider, not only the fact of the dangerous character of the weapon which was used, if you find that such a weapon was used, but it is also competent for you to consider the other occurrences which seem to have taken place at or about the same time. In this connection, as bearing upon the question whether the person who killed Simeon Sturtevant did so with deliberately premeditated malice aforethought, you may take into consideration the fact, if you find it to be a fact, that he also killed, at the same time or about the same time, the other two persons. The evidence that the weapon was deliberately taken and brought there for the purpose would be sufficient to warrant you in finding that it was deliberately premeditated, so as to make it murder in the first degree.

So, also, if you are satisfied that this homicide was com-

relates a remarkable instance of a man, who rebutted a charge of rape by showing that he labored under a frightful rupture, which rendered sexual intercourse mitted in the attempt to commit the crime of robbery by entering that house, or being in the house by entering any of its rooms against the will of the owner, the rooms not being open, then, whatever may have been the purpose of the individual who went there originally, if this homicide was the result of an attempt to commit such a robbery, it is, by the express declaration of the statute, murder in the first degree.

If, therefore, you find that this weapon was taken there for the purpose of being used in the homicide, or if you find that the person who committed the homicide did it in the attempt to commit a robbery and in the execution of the purpose of the robbery, then you must find him guilty of murder in the first degree.

But the main question, as I suggested, is one of fact, not as to the character of the offense committed, because there is no serious controversy here that this was such a murder as would be murder in the first degree. Nevertheless it is for you to find that what is the fact, and the law requires that you should find it, and state it in your verdict. If you find a criminal homicide, you will say whether it be manslaughter or murder, and if murder, whether in the first or second degree. But the principal question is, did this person, who is now arraigned before you, commit the act which resulted in the death of Simeon Sturtevant? The whole case, as has been suggested to you, rests upon circumstantial evidence. It is necessary, therefore, to consider somewhat the character of that kind of evidence.

Of course where a person kills another, the most direct evidence as to the perpetrator of the assault is, by the very act of killing, destroyed. Here the three persons who were the occupants of the house were killed. The direct evidence, therefore, is put beyond reach, and necessarily circumstantial evidence must be resorted to. It may be that the purpose of the killing was merely to put the evidence beyond reach; it may be that it was merely as a means of reaching the object in view—to secure booty. Whatever it may be, the direct evidence has disappeared, and you are left, therefore, to circumstantial evidence. The closing remarks of the government attorney, which adopted language which had been used by the court in similiar proceedings to this, so far as I could see, were not open to any exception. He has stated substantially

almost, if not absolutely, impossible. (*f*) This is, however, an old case; and should a similar one now occur, the perfection which the manufacture of trusses

(*f*) 1 Hale, P. C. 635, 636.

what the nature of circumstantial evidence is. It is indicated by the very term itself. Circumstantial evidence is the evidence from facts which stand around the main fact to be proved. Direct evidence is evidence pointing directly to the establishment of the fact. Direct evidence, as has been stated, is evidence from the sight, or some of the senses, of the very fact in controversy; but when such evidence is gone, we resort, in capital trials, as in all the business of life, to what is called circumstantial evidence; that is, we resort to those inferences which the mind draws from surrounding circumstances, and it is stronger or weaker according to the nature of those circumstances—their nearness in relation to the fact to be established, and their concurrence with each other towards one and the same conclusion. If you find all the facts which are developed in regard to a transaction or in regard to a person to indicate one line of results, then you draw from those facts an inference as to other facts which are not brought to your vision, and not brought to your actual knowledge.

Perhaps I may illustrate by some of the evidence in the present case substantially what I would have you understand as to the bearing of evidence which is in its nature circumstantial. Take, for instance, the evidence as to the weapon which killed Simeon Sturtevant. There was no weapon found in the room; there is nothing by which the precise shape and size and form of the instrument can be gathered in the wounds which he received, except that it was not a sharp instrument,—that it was some blunt, smooth, but heavy, solid instrument. Now, you find the three persons killed with similar wounds; you find this club lying near one of them; you find blood upon that club; you find no other instrument anywhere about the premises which appears to have been used for such a purpose, or which appears not to be in its own proper place. You put together all these surrounding circumstances. You may for instance consider that there were marks upon the ceiling of the porch or kitchen, and upon the casing of the door, which indicated that they might have been produced by such a club. You may take into consideration the fact, if you believe that it is so, that there were particles of plaster on the point of the club, and also in the indentations

has attained in modern times, would be an affirmative circumstance not to be overlooked.

202. The infirmative hypotheses affecting real upon the casing of the door. You may take into consideration the character of the club, and the description of the wound, as indicating whether or not the wound was such as would be likely to be produced by such an instrument. You may take into consideration the position of the various persons who were injured and the direction of the wounds. You may take into consideration, also, the fact that a piece of bone was found in the club. Now you will see that no one of these facts proves directly that that club was used in killing Simeon Sturtevant, but as circumstantial evidence, they have strong tendency in that direction, from which you may infer, and perhaps you will infer, as beyond all question, that that club was used in the killing of Simeon Sturtevant. If you come to the conclusion, that that club killed Simeon Sturtevant, that then becomes a new fact in the case, which your minds may take as a fact, from which other inferences may be deduced, if other facts concur with it, to aid you in making such other inferences. But the fact alone that that club, which was found in the field, was the club which killed Simeon Sturtevant, does not help you at all, so far as tracing anything to this defendant is concerned. It helps you to come to the conclusion what the instrument was which killed Simeon Sturtevant, and that is all; so that in order to ascertain anything in the direction of the person who committed the act, you desire to find other circumstances to put with this, and see whether they point in any particular direction; and each new circumstance adds a new point by which the field of investigation is narrowed, so by getting a great many points you may bring it down to a small compass, and say, "The fact we are seeking lies here, within this narrow compass, and therefore our investigations in that compass will probably lead us, if we can get all the facts, to the right person, although they do not separately indicate who that person is."

You will see that the officers act upon this idea. They find that the club corresponds to a place in a cart from which a stake is absent, and it fits that place. You would draw the inference from this, that it was taken from that place. It is not a necessary inference. It is aided by the further evidence of Mr. Jefferson, who knows something about the cart, and who says, from indications which he finds, and which he has described to you, that he put that stake on the third of January

evidence, however, present a subject of too much importance to be dismissed with a cursory notice. Considered in the abstract, real evidence, apparently and put it in that cart, and that it was there when he last left it at Mrs. Jossleyn's house, as I understand it; but the precise period when he last saw it is not in evidence. You, therefore, get one point further towards your destination, but you have not yet got anything that touches anyone in particular; you have only narrowed the ground, given some direction to the inquiry which should result in finding the person; because although you are satisfied that this club came from that cart some time after the third of January, between the third of January and the fifteenth of February, anybody passing that way might have taken that club, and might have left it where the person who committed this offense found it. The person who took the stake from the cart would not necessarily be the one who committed the offense.

Then you take other circumstances. If you are satisfied, for instance, from the character of the money in the house, that the money scattered upon the ground was money stolen that night,—that is a matter of which you may or may not be satisfied by the inferences which you may draw from other corresponding facts, from the failure to account for it in any other way,—if you take that, then, as money that was stolen that night, and you take the mode in which it was distributed as indicating the direction in which the person who committed the offense that night went, then you see you have another circumstance which points in that direction, and you are to give it such weight as it has, not merely by itself, but in concurrence with the other facts which you have traced out.

And so the footprint. The footprint, you will perceive, by itself, is a footprint which might be made, perhaps, by many other shoes, no one knows how many. Standing by itself, it would have no especial force. You are only to consider it as one of those surrounding circumstances which may have more or less of force, according as you find it tallies with other circumstances in one conclusion which may be arrived at.

So, in further illustration of this same idea, I may make a few remarks upon the subject of the blood. The spots which were found upon the overcoat of the prisoner, the spots which were found upon his shirt collar, the spots which were found upon his hat, the spots which were found upon the pillow-

indicative of guilt, may be indebted for its criminative shape to accident, forgery, or the lawful action of the accused. Here it must not be forgotten, that some-case, or at least on a piece of cloth from a pillow-case from the house, the spots on the paper about the bed of Simeon Sturtevant, and various other spots, some of which were human blood and some of which were blood the character of which is to be ascertained, were examined. Now, the blood upon the garments of the prisoner is competent evidence upon the question whether he committed the offense. Even though it be not shown that it is anything more than blood, you are to consider it, because, if he has blood upon his clothing the second day after the murder, inferences may be drawn from it which will be stronger or weaker according to the character of the blood found upon him, its position, whether there is any way of explaining its existence there otherwise; and if you have merely the fact that it is blood, it leaves open a wide range of possibilities that are consistent with innocence. It may be the blood of a chicken, it may be the blood of a mammal, it may be the blood of a man. Now, then, if you proceed and can by any satisfactory means show that it is not the blood of a fowl or a fish, then you see you have narrowed the range of investigation, and you have given to it more importance, because it is open to fewer explanations of other sources from which it may come. So, if you can proceed further and show, from its correspondence, when restored, to the blood of human kind which has been dried and restored, that it is human blood, then the force of it, as a circumstance touching the defendant, is increased. Whether that can be done or not is a matter for your consideration, upon the evidence which has been presented to you. If it can be done and has been done, so that you are satisfied that it is human blood, then it is a circumstance of much more importance and significance than if it remained simply as blood; more, even, than if it remained as the blood of an animal. You are to take into consideration the evidence in regard to its being human blood, and give it weight just according to the degree of force which you may be willing to give it in your own minds as evidence tending to show that it is human blood. If it is not shown to your satisfaction to be human blood, and is shown to your satisfaction to be mammal blood, and not the blood of fowls or of fishes, then you will give it that consideration. If it is merely shown to be blood, and nothing more, you will give it such consideration, in that wider range of

times the most innocent men cannot explain, or give any account whatever, of facts which seem to criminate them ; and the experience of almost every person possibilities in accounting for it, as you think it is entitled to, merely as blood. In other words, the degree of force with which this should weigh, as circumstantial evidence, in connection with other evidence, depends upon the degree of certainty with which you can narrow down its character, or the strength of the probabilities which you can bring to bear upon the question of its character,—whether merely blood, the blood of a mammal or the blood of a human being. It does not prove, alone, the guilt of the defendant ; but its main force depends upon the consideration whether it might reasonably be accounted for, if it be human blood, or if it be blood, upon other considerations, or whether it is accounted for by supposing that the prisoner committed this deed, and can be accounted for in no other way.

You will take all the evidence in connection with each one of these circumstances into consideration, bearing in mind that neither of the circumstances is necessarily proof of the guilt of the prisoner. Each one of the circumstances is competent for your consideration as a circumstance, the force of which will depend upon its agreement or coincidence with other circumstances pointing in one or the other direction.

So in regard to the possession of money. It is a general rule, that where property has been stolen, and it is afterwards found in the possession of a person who is not its rightful owner, that is evidence that he committed the theft. But you see it is not a necessary conclusion ; it is only an inference which is drawn from the other facts. It is an inference drawn against him, because, if he were not the thief, he can generally tell where he got it. It is an inference stronger or weaker according to the length of time which has elapsed since the loss of the property, and the ease with which it might be transmitted from one to another without the capacity to recollect where it came from.

Now, money is not exactly like a horse, or a cow, or any other article of that sort which might be stolen and found in the possession of another person. The possession of money by the prisoner is a circumstance, and you are to treat it as you would any other circumstance. You are to treat it just as if this trial was for theft instead of for murder. So the circumstance of the money which he had is a circumstance to be taken with the other circumstances upon the question which



will supply him with instances of extraordinary occurrences, the cause of which is, to him at least, completely wrapt in mystery. 1. Accident. The ap- you are to consider. And in that connection, it is important for you to inquire whether he was possessed of money the week before, or whether he was without funds. If he was without funds the week before, and the day after this murder, or the second day, was in possession of a large amount of funds, that circumstance, unexplained, if there was a loss of money at the house, is a strong circumstance tending to show his guilt. Then you will consider the character and satisfactoriness of the explanation which he may have given of the possession of money on Tuesday which he had not the week before, if you are satisfied that he did not have it the week before. In this connection, as bringing it more nearly to the case of the theft of a cow or a horse, you will have to consider any peculiarity this money had, and its correspondence with any money which was in the house of the Sturtevants.

I need not go into these matters in detail. My purpose was not to touch upon the question of the force of them, but to call your attention to the relation which each circumstance has to the question you are investigating. If you are satisfied that this money which he had was of such a peculiar character that he would not be likely to be in possession of it, except from the theft in this house, then it is a strong circumstance. If, however, the money that he had was of the kind which was in general circulation at the time, then the peculiarity of the money ceases to have force. If you are satisfied that he had no money the week before, and had a large amount on Tuesday, then, unless he gives some account of a sudden acquisition, it is a strong circumstance which you may consider. If, in attempting to account for the possession of the money, whether as to its amount or its peculiarity, he has given unreasonable accounts, false accounts, accounts which were not satisfactory and are not probably, you may take that into consideration; because an innocent man ordinarily has no occasion to give a wrong account of what is in his possession.

But in this connection, you must take into consideration the fact, that a man who is apprehensive of a charge of crime is not always gifted with that clear presence of mind and courage which enables him to tell stories which are thoroughly consistent with the truth and with his innocence. You are to take into consideration how far he may have been influenced by any fear of this sort. You are also to take into

pearance of blood on the clothes of an accused or suspected person, may be explained by his having, in the dark, come in contact with a bleeding body. (*g*)

(*g*) See the Case of Jonathan Bradford, Theory of Pres. Proof, Appendix, case 7. In Chambers's Edinburgh Journal also, for 11th March, 1837, there is a case where part of the evidence against a man charged with murder, consisted in his night-dress

having been found stained with blood; a fact which he declared his inability to account for; and which was afterwards discovered to have been occasioned by his bed-fellow having a bleeding wound, of which the prisoner was not aware.

consideration the suggestions which have been made arising from the fact, that there were other suspicions against him as to money, and see whether, taking all these suggestions into consideration, they account for any discrepancies in his statements with the truth, as you are satisfied the truth is, or for any improbable explanations.

The evidence as to the loss of money by Mr. White was excluded, because there seemed to be no evidence, and no proffer of evidence, to connect the prisoner with the loss particularly, except his own statements, which are not competent for the purpose—I mean his own statements elsewhere. The loss of money by Mr. White, in the opinion of the court, did not tend to account for the possession of money in his hands, any more than the loss of money by any one in the neighborhood. There has been money enough lost, every one knows, in the community, in years past, to account for any amount of money in the possession of any one. Therefore that evidence was not admitted to account for the money found in his possession. But the prisoner has a right to the benefit of the suggestion that he might, either by honest or dishonest means, have acquired this money elsewhere. You are to take into consideration all the suggestions that have been made about his acquiring means in an honest manner; you are to take into consideration the suggestions that have been thrown out that he had acquired some in a dishonest manner, other than this: and if these explain any of the discrepancies of his statements to the officers as to this money, he is entitled to the benefit of the suggestion, because he is entitled to whatever raises a doubt in your minds.

The confessions of the prisoner, obtained in the mode these were obtained, the court thought were competent to be admitted here against him; but it is due to him to say, that confessions by one under arrest, or one charged with an offense, or one who is subjected to scrutiny and surveillance,

Under this head come those cases where the appearance is the result of irresponsible agency : as where the act has been done by a party in a state of *sonnam-*are always to be scrutinized carefully, lest he may be misunderstood in his statements, or the interrogator, from zeal, or preoccupation of mind as to the hearing of those statements, may either understand them incorrectly, or report them incorrectly. Here they are competent evidence, and you are to consider them under all the circumstances in which they were made, and see how far they tend to show guilt, and how far they are to be explained by anything in the circumstances of the prisoner when he made them, which weakens or strengthens their force.

The omission of the prisoner, as I have already suggested, to explain any facts which bear upon him personally, may be taken into consideration just so far as you think it reasonable to expect that he would have explained them if he were innocent. It is often beyond the power of a man to explain a fact which bears against him. The mere omission to explain a fact which appears against him is not of itself evidence against him, because the burden is all the time upon the government to furnish you the evidence upon which to convict him, beyond a reasonable doubt. But when a fact which bears upon him personally is brought to his attention, and it is such a fact as you think he may reasonably be expected to explain, and would explain if he were innocent ; that is, if it may reasonably be supposed that the explanation would be within his power, and he fails to produce it ; then that is to be taken into consideration, and to bear against him just so far as you think that failure is inconsistent with innocence and indicative of guilt. And that consideration you are to apply to his omission to produce his wife as a witness. If you think that, if he had been innocent, she would have been able to prove his innocence, then the non-production of his wife is ground of inference that her production would not establish any fact favorable to him. You have heard the suggestions of his counsel, and it is right for you to take into consideration all reasonable suggestions as to the reason of her absence. Of course, it would be a severe trial for her to come here on such an occasion as this, and if her evidence would have been merely negative, even though, so far as it went, it would be consistent with his innocence, the prisoner might well forbear to produce it. But you will consider upon all the circumstances how far his omission to produce her shows

bulism; (*h*) or as in the case of the unfortunate person in France, who was executed as a thief, on the strength of a number of articles of missing silver hav-

(*h*) Cases of this nature have occurred. See Ray's *Med. Jurisp. of Insan-ty*, §§ 295, 297; *Matth. de Criminib. Prolegomena*, ch. 2, § 13; and Taylor, *Med. Jurisp.* 789, 790, 4th ed. Two men who had been hunting during the day slept together at night. One of them was renewing the chase in his dream, and imagining himself present at the death of the stag, cried out, "I'll kill him, I'll kill him!" The other,

awakened by the noise, got out of the bed, and, by the light of the moon, beheld the sleeper give several stabs with a knife on that part of it which his companion had just quitted (*Hervé's Meditations on the Night*, note 35). Suppose a blow given in this way had proved fatal, and that the two men had been shown to have quarrelled before retiring to rest!

that her production here would not aid him, and, if it would not aid him, how far it is a ground for any inference to the contrary. As I said, you must take into consideration all the suggestions which are made in regard to her absence, and if suggestions have not been made, you will take into consideration those which occur to your own minds, including, also, the position in which both the prisoner and his wife are placed.

I have gone over the evidence, not to collate it, not to show how strongly it may bear, not to connect it, but to show in what respect it is to be taken by you as bearing directly, and in what respect it only establishes some collateral fact. You have heard the arguments of counsel on both sides as to its force, as to its connection, as to the truth of the evidence by which the guilt of the prisoner is sought to be established, and you will give to the arguments, and to the evidence as you heard it, such consideration as you think is due to them, with the aid of the suggestions, as to the bearing of the legal presumptions, which I have suggested.

All the circumstances which have been called to your attention are to be treated in their relation to each other, and you are to see, not whether each one may be explained away, not whether each one shows guilt, but whether all together point in such a direction as to indicate one result only, and that result the guilt of the prisoner. If it does so, beyond a reasonable doubt, to your minds, then it is your duty to find him guilty. If it fails to do so, if it points elsewhere, or if all which points towards him is not enough to remove from your minds serious doubts, all reasonable doubts, as to his being the person who committed the offense, then it is your duty to

ing been found in a place to which he alone had access, and which were afterwards discovered to have been deposited there by a magpie. (*i*)

(*i*) 3 Benth. Jud. Ev. 49; Bonnier, *Traité des Preuves*, § 647.

say that he is not guilty, because he is not guilty unless the government, by the evidence which they have produced here before you, have sustained the burden upon them, which is to satisfy your minds, beyond a reasonable doubt, that this defendant committed the offense of robbing this house and murdering Simeon Sturtevant. If you are satisfied, from all the evidence, that he, and no one else, committed this offense, or that he committed it with some one else,—for it is immaterial whether he committed it alone or with some one else, if he was engaged in it,—if you are satisfied, beyond a reasonable doubt, that all the evidence points to him, that there is no reason to suppose that there is any one else to whom the evidence would apply, then the government have sustained that burden; and your duty is fulfilled by simply declaring him guilty. If they have failed to sustain that burden in all respects, so as to remove from your minds all reasonable doubt, then it is your duty to find him not guilty. If, as I before said, you find him guilty of murder, you will indicate, in your verdict, whether it is murder in the first degree or in the second degree.

Mr. Harris: I desire your honor to qualify one remark which was made in the charge, which was this: that if the evidence points to the prisoner in such a manner that it seems to require of him an explanation, and he has not made it, then the jury may draw certain conclusions. What I desire is, that your honor will say to the jury that in that remark you did not intend to imply that it devolved upon the prisoner, upon the stand, to explain it.

Wells, J.:—Thank you. I intended to say so, and I should say so, because the statute expressly requires it. In all these suggestions as to his failure to explain, you must carefully exclude all suggestions that would require him to go upon the stand; because, although he may go upon the stand, it is a privilege which a prisoner rarely takes, and which, under the advice of counsel, he may decline to take, without any inference against him on account of his not going upon the stand. Therefore, when I said that if any fact against him is brought to your attention which you think he might explain if he were innocent, and can reasonably be expected to ex-

**203.** 2. There is no subject in the whole range of judicial proofs, which demands more anxious attention than the forgery of real evidence. It is in some degree analogous to the subornation of personal evidence, being an attempt to pervert and corrupt the nature of things or real objects, and thus force them to speak falsely. (*k*) The presumption of guilt afforded by the detection of a forgery of real evidence, is a different subject, and is based on the maxim, "*Omnia præsuntur contra spolitorem*" (*l*)—its weight, as an affirmative hypothesis respecting real evidence in general, being all that comes in question at present.

**204.** Forgery of real evidence may have its origin in any of the following causes: 1. Self-exculpation. 2. The malicious intention of injuring the accused, or others. 3. Sport, or with the view of effecting some moral end.

**205.** 1. Self-exculpatory forgery of real evidence.

(*k*) 3 Benth. Jud. Ev. 50.

(*l*) *Infra*, bk. 3, pt. 2, ch. 2.

plain, and he does not explain it, you may draw the inference that the fact exists unfavorably to him, I intended that you should exclude, in considering whether it is reasonable to expect him to explain it, any idea of his explaining it by his own personal testimony. If there are any facts which tell against him, and which can only be explained by himself,—that is, which no one else could be brought to explain, or which he by his knowledge could not, unless he went upon the stand, explain,—you will not draw any inference against him because he does not go upon the stand himself. But so far as he had attempted to explain any facts brought against him, you will consider how far the explanation is satisfactory; and if he has failed to give a satisfactory explanation, or given a false explanation, then you will consider that. You will be careful to exclude any inference against him, because he does not explain by going upon the stand here in the trial.

The jury, after an absence of two hours, found a verdict of guilty of murder in the first degree, upon which sentence of death was subsequently imposed. He was executed May 7, 1875.

An excellent instance of the danger to be apprehended from this source is given by Sir Matthew Hale, in a passage which is very frequently quoted. After observing, that the recent and unexplained possession of stolen property raises a strong presumption of larceny, he tells us of a case tried, as he says, before a very learned and wary judge, where a man was condemned and executed for horse-stealing, on the strength of his having been found upon the animal the day it was stolen; but whose innocence was afterwards made clear by the confession of the real thief; who acknowledged that, on finding himself closely pursued, he had requested the unfortunate man to walk his horse for him while he turned aside upon a necessary occasion, and thus escaped. (*m*) This species of forgery, however, is not confined to criminals. It sometimes happens that an innocent man, sensible that, though guiltless, appearances are against him, and not duly weighing the danger of being detected in clandestine attempts to stifle proof, endeavors to get rid of real evidence in such a way as to avert suspicion from himself, or even to turn it on some one else. An extremely apt illustration is to be found in the Arabian Nights' Entertainments, (*n*) where the body of a man, who had died by accident in the house of a neighbor, was conveyed by him—under the apprehension of suspicion of murder in the event of the corpse being found in his house—into the house of another neighbor; who, finding it there, and acting under the influence of a similar apprehension, in like manner

(*m*) 2 Hale, P. C. 289. A similar conviction occurred in Surrey in 1827, but the fatal result was averted. *R. v. Gill, Wills, Circ. Evid.* 54, 3rd ed. See also the Case of John Jennings, Theory of Presumptive Proof. App., case 1; and that of Du Moulin, Chambers's Edinb. Journ. for Oct. 28, 1837.

(*n*) 3 Benth. Jud. Ev. 36. The story alluded to is the well-known one of the little hunchback.

transmitted it to a third ; who, in his turn, shifted the possession of the corpse to a fourth, with whom it was found by the officers of justice.

206. 2. The forgery of real evidence may have been effected, with the malicious purpose of bringing down suffering on an innocent individual. The most obvious instance is to be found in a case, probably of more frequent occurrence than is usually supposed—namely, where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with the view of exciting a suspicion of larceny against him ; (*o*) and a suspicion of murder may be raised by secreting a bloody weapon in the like manner. (*p*) In the case of *Le Brun*, (*q*) who was accused of having murdered a lady of rank to whom he was servant, the officers of justice were charged by his advocates with having altered a common key, found in his possession, into a master key, in order to make it appear at the trial, that he had a facility for committing the murder which he really did not possess. “Another remarkable example,” says Mr. Arbuthnot, in the preface to his Reports of the Foudaree Udalt of Madras, (*r*) “is related in a Report recently published on the Wellicade Jail at Colombo in Ceylon. A man named Sellapa Chitty, of the class termed Nattacotie, reported wealthy, and largely en-

(*o*) In the Preface to Mr. Arbuthnot's Reports of the Court of Foudaree Udalt of Madras, Madras, 1851, p. xlii. is the following passage : “In the annals of criminal justice in this country, instances of this species of forgery of real evidence are far from uncommon ; it being a matter of notoriety that the clandestine placing of articles in the houses of accused persons, with a view to facilitate their conviction of a crime charged, is fre-

quently resorted to by the native officers of police ; while the production by the police, from the houses of accused persons, of articles which are really their property, but are alleged to have been obtained by theft or robbery, is still more common.”

(*p*) Theory of Presumptive Proof, App., case 10.

(*q*) 3 Benth. Jud. Ev. 60.

(*r*) Pages xli. xlii.



gaged in trade, charged his neighbor and rival in business, with causing the death of a Malabar cooley, by burning and otherwise ill-treating him; whereas it was found that the man had died a natural death, and that the prisoner, together with a relative and servant had applied fire to several parts of the body, and deposited it on the premises of the accused; after which he gave notice to the police, and charged the innocent party with the murder. The case seemed clear, and the accused would have been tried on the capital charge, had not the medical gentleman, on the inquest, observed the unusual appearance of the burnt parts, and finally discovered that the injuries had all been inflicted on the body after death." The numerous cases that have occurred of persons inflicting wounds, often of a serious nature, on themselves, with the view of attaining some end (*s*)—in some instances for the purpose of enabling them to accuse hated individuals (*t*)—should induce tribunals to be more on their guard against the forgery of real evidence, than they commonly are. And, as though no limit could be assigned to human wickedness, it is said that even suicide has been committed with a like view. (*u*) The following application of this kind of forgery is likely to be made, in countries where the legitimate principles of evidence are either not well understood, or not duly observed. We allude to the artifice of sending to the person whom

(*s*) See Tayl. Med. Jurisp. 254 et seq., 3rd ed.; Beck's Med. Jurisp. 32 et seq., 7th ed.

(*t*) Tayl. in loc. cit. In the Times newspaper for January 30, 1847, will be found the case of a girl at Reading, who, enraged against a man for having ceased to live with her, cut her throat severely, and then charged him

with having attempted to murder her.

(*u*) We have somewhere read a case of that kind; and believe also that the French Jacobins were accused of having slain, with his consent, one of their number, in order to throw on the Royalists the imputation of having murdered him as a political enemy.

it is desired to injure letters, in which either the mode of committing some crime is discussed, or allusion is made to a supposed crime already committed; and then procuring his arrest, under such circumstances that the document may be found in his possession. *E.g.*, "On such an occasion" (naming it), "my dear friend, you failed in your enterprise;" an enterprise (describing it by allusion) of theft, robbery, murder, treason; "on such a day, do so and so, and you will succeed." (x) "In this way," observes Bentham, "so far as possession of criminative written evidence amounts to crimination, it is in the power of any one man to make circumstantial evidence of criminality in any shape against any other." (y)

207. It sometimes happens that real evidence is forged with the double motive of self-exculpation, and of inducing suspicion on a hated individual. (z) And, lastly, it is to be observed, that this species of forgery may be accomplished by force as well as by fraud; *e.g.* three men unite in a conspiracy against an innocent person: one lays hold of his hands, another puts into his pocket an article of stolen property, which the third, running up as if by accident during the scuffle, finds it there, and denounces him to justice as a thief. (a)

208. 3. Forgery of real evidence committed either in sport or with the view of effecting some moral end. As an instance of this may be cited the story of the patriarch Joseph, who, with a view of creating alarm and remorse in the minds of his guilty brothers for their conduct towards him in early life, caused a silver cup to be privately hid in one of their sacks, and

(x) 3 Benth. Jud. Ev. 44.

(y) Id.

(z) See the case of the Flemish

parson in 5 Causes Célèbres, 442, ed Richer, Amsterd. 1773.

(a) 3 Benth. Jud. Ev. 39.

after they had gone some distance on their journey, had them arrested and brought back as thieves. (*b*)

209. 4. The other infirmative hypothesis affecting real evidence remains to be noticed; namely, that the apparently criminative fact may have been created by the accused, in the furtherance of some lawful, or even laudable design. This is best exemplified by those cases of larceny, where stolen property is found in the possession of a person who, knowing or suspecting it to have been stolen, takes possession of it with the view of seeking the true owner in order to restore it, or of bringing the thief to justice: but before this can be accomplished, becomes himself the object of suspicion, in consequence of the stolen property being seen in his possession, or of false information being laid against him. (*c*) In cases of suspected murder, also, stains of blood on the person or dress of the accused or suspected party, may have been produced by many causes, (*d*) *e.g.*, the slaughter of an animal, an accidental bleeding from the nose (*e*) a surgical operation, (*f*) &c.

210. Real evidence, while truly evidentiary of guilt in general, may be fallacious as to the quality of the crime. The recent possession of stolen property, for instance, standing alone, is deemed presumptive evidence of larceny, not of the accused having received the goods with a guilty knowledge of their

(*b*) Genesis, xlv. 2 et seq. See 3 Benth. Jud. Ev. 37, 52.

(*c*) The author has an impression of having seen a case on circuit, where a pedlar got drunk in a public house, and a person present took possession of his pack with the view of returning it to him when sober, and was rewarded for his charity by an indictment for larceny.

(*d*) Quintil. lib. 5, c. 12,

(*e*) Id. lib. 5, c. 9.

(*f*) In the case of William Shaw, executed at Edinburgh in 1721, for the supposed murder of his daughter, who had committed suicide, one of the facts which pressed against him was that his shirt was bloody, which was, however, caused by his having bled himself some days before, and the bandage becoming untied. Theory of Pres. Proof, App., case 8,

having been stolen. (*g*) And there can be little doubt, that many persons have been convicted and punished for the former offense, whose guilt consisted in the latter; while on the other hand justice has often failed the other way—a party guilty of receiving stolen property, having been erroneously indicted for larceny. (*h*) This imperfection in our criminal law was remedied by the 11 & 12 Vict. c. 46, s. 3, and 24 & 25 Vict. c. 96, s. 92, which allow counts for larceny to be joined with counts for receiving goods, knowing them to have been stolen. (*i*) So where a person is found dead and plundered of his property, the subsequent possession of a portion of it may induce a suspicion of murder, against a party whose real crime was robbery. (*k*)

211. There is one species of real evidence which deserves a more particular consideration, namely, the presumption of larceny, arising from possession by the accused of the whole or some portion of the stolen property. Not only is this presumptive evidence of delinquency when coupled with other circumstances; but, even when standing alone, it will in many cases raise a presumption of guilt, sufficient to cast on the accused the onus of showing that he came honestly by the stolen property; and in default of his so doing, it will warrant the jury in convicting him as the thief. This presumption is, not only, subject to the infirmative hypotheses attending real evidence in general; but, from its constant occurrence, and the obvious danger of acting indiscriminately upon it, it has, as it were, attracted the attention of judges, who have en-

(*g*) *R. v. Densley*, 6 C. & P. 399;  
*R. v. Oddy*, 2 Den. C. C. 273, per  
 Alderson, B. See *R. v. Langmead*, 1  
 Leigh & C. 427, 439.

(*i*) See also 14 & 15 Vict. c. 100  
 s. 12.

(*k*) See *R. v. Downing*, Wills, Circ  
 Evid. 137, 3rd ed.

(*h*) See *R. v. Collier*, 4 Jurist, 703.

deavored to impose some practical limits to its operation, where it constitutes the only evidence against the accused. And first, it is clearly established that, in order to put the accused on his defense, his possession of the stolen property must be recent; (*l*) although what shall be deemed recent possession must be determined by the nature of the articles stolen—*i. e.* whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused would be likely, from his situation in life, or vocation, to become possessed innocently. (*m*) A poor man, for instance, might fairly be called to account for the possession of articles of plate, jewels, or rare and curious books, after a much longer time than if the property found on him had consisted of clothes, articles of food suitable to his condition, tools proper for his trade, &c. In the first reported case on this subject, (*n*) Bayley, J., directed an acquittal, because the only evidence against the prisoner was, that the stolen goods (the nature of which is not stated in the report) were found in his possession after a lapse of sixteen months from the time of the loss. Where, however, seventy sheep were put on a common on the 18th of June, but were not missed till November, and the prisoner was in possession of four of them in October, and of nineteen more on the 23d of November, the same judge allowed evidence of the possession of both to be given. (*o*) In the subsequent case of *R. v. Adams*, (*p*) where the prisoner was indicted for stealing an axe, a saw, and a mattock, and

(*n*) 2 Stark. Ev. 614, 3rd. ed.; 5 East, P. C. 657; *R. v. Cockin*, 2 Lew. C. C. 235; and the cases cited in the following notes.

(*m*) 2 Russ. on Crimes, 338, 4th ed.; *R. v. Partridge*, 7 C. & P. 551;

*R. v. Cockin*, 2 Lew. C. C. 235, n.

(*n*) Anon., 2 C. & P. 459.

(*o*) *R. v. Dewhirst*, 2 Stark. Ev. 614, note (e), 3rd ed.

(*p*) 3 C. & P. 600.

the whole evidence was, that they were found in his possession three months after they were missed, Parke, J., directed an acquittal. And in a more recent case of *R. v. Cruttenden*, (q) where a shovel which had been stolen, was found about six or seven months after the theft, in the house of the prisoner, who was not then at home, Gurney, B., held that, on this evidence alone, the prisoner ought not to be called on for his defense. In *R. v. Partridge*, (r) however, where the prisoner was indicted for stealing two "ends" of woollen cloth, (*i. e.* pieces of cloth consisting of about twenty yards each), which were found in his possession about two months after they were missed; on its being objected that too long a time had elapsed, Patteson, J., overruled the objection, and the prisoner was convicted. Afterwards, in *R. v. Hewlett*, (s) a prisoner was indicted for stealing three sheets, the only evidence against him being, that they were found on his bed in his house three calendar months after the theft. On this it was objected by his counsel, on the authority of *R. v. Adams*, that the prisoner ought not to be called on for his defense. But Wightman, J., said, that it seemed to him impossible to lay down any definite rule, as to the precise time within which a prisoner might be called on to give an account of the possession of stolen property; and that although the evidence in the actual case was very slight, it must be left to the jury to consider what weight they would attach to it. The prisoner was acquitted. In *R. v. Cooper*, (t) where a mare which had been lost on the 17th of December, was found in the possession of the prisoner between the 20th of June and the 22d of July

(q) 6 Jur. 267; and MS., Kent Sp. Ass. 1842.

(r) 7 C. & P. 551.

(s) 3 Russ. on Crimes, 216, 4th ed.; Salop Sp. Ass. 1843.

(t) 3 Car. & K. 318.

following, and there was no other evidence against him, Maule, J., held the possession not sufficiently recent to put him on his defense. In dealing with this subject it is to be remarked, that the probability of guilt is increased by the coincidence in number of the articles stolen with those found in the possession of the accused,—the possession of one out of a large number stolen being more easily attributable to accident or forgery than the possession of all. (*u*)

**212.** But in order to raise this presumption legitimately, the possession of the stolen property should be exclusive as well as recent. If, for instance, the articles stolen were found on the person of the accused, or in a locked-up house or room, or in a box of which he kept the key, there would be fair ground for calling on him for his defense; but if they were found lying in a house or room, in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access, this would raise no definite presumption of his guilt. (*x*) An exception has been said to exist, where the accused is the occupier of the house in which stolen property is found; because, it is argued, he must be presumed to have such control over the house, as to prevent anything coming in or being taken out without his sanction. As a foundation for civil responsibility this reasoning may be correct; but to conclude that the master of a house is guilty of felony, on the double presumption, first, that stolen goods found in the house were placed there by him or with his connivance; and, secondly, even supposing they were, that he was the thief who stole

(*u*) 2 Russ. on Crimes, 339, note (r), 4th ed.; per Erle, J., *R. v. Brown*, MS.; Kent Sum. Ass. 1851.

(*x*) 2 Stark. Ev. 614, 3rd ed., note (g); Rosc. Crim. Ev. 19, 4th ed.

them, there being no corroborating circumstances, is certainly treading on the very verge of artificial conviction. (*y*)

213. Indeed, there can be no doubt that, in practice, the legitimate limits of the presumption under consideration are sometimes overstepped. "Nothing," remarks, Bentham, "can be more persuasive than the circumstance of possession commonly is, when corroborated by other criminative circumstances: nothing more inconclusive, supposing it to stand alone. Receptacles may be contained one within the other, as in the case of a nest of boxes; the jewel in a case; the case in a box; the box in a bureau; the bureau in a closet; the closet in a room; the room in a house; the house in a field. Possession of the jewel, actual possession, may thus belong to half-a-dozen different persons at the same time: and as to antecedent possession, the number of possible successive possessors is manifestly beyond all limit." (*z*) It is in its character of a circumstance joined with others of a criminative nature, that the fact of possession becomes really valuable and entitled to consideration, whether it be ancient or recent, joint or exclusive. But, whatever the nature of the evidence, the jury must be morally convinced of the guilt of the accused, who is not to be condemned on any artificial presumption or technical reasoning, however true and just in the abstract.<sup>1</sup>

(*y*) "Il y aurait injustice flagrante, à réputer complice d'un vol. celui chez qui l'objet volé serait trouvé, ainsi qu'on le faisait à Rome pour la réparation civile du délit. Présumer la culpabilité, à raison des circonstances qui peuvent n'être que fortuites, c'est

là une marche grossière, qui appartient à l'enfance du droit pénal." Bonnier, *Traité des Preuves*, § 675. See also Hume's *Crim. Law of Scotland*, vol. I, p. III.

(*z*) 3 Benth. *Jud. Ev.* 39, 40.

<sup>1</sup> There is no branch of legal knowledge which is of more general utility than that which regards the rules of evidence. The first point in every trial is to establish the facts of the



214. When the case against the accused, is sufficiently strong to warrant his being called on for his defense, the credit due to any explanation he gives of case; for he who fails in his proof, fails in everything. Although the jurists hold the law to be always fixed and certain, yet the discovery of the fact, they say, may deceive the most skillful. No work has as yet appeared in the English language on the theory of evidence; and the nature of circumstantial evidence has been still less inquired into. The object of the present Essay is to inquire into some of the more general principles of legal proof, and particularly into that species of proof which is founded on presumptions, and is known to the English lawyer by the name of circumstantial evidence.

Evidence and proof are often confounded, as implying the same idea; but they differ, as cause and effect. Proof is the legal credence which the law gives to any statement, by witnesses or writings; evidence is the legal process by which that proof is made. Hence, we say, that the law admits of no proof but such as is made agreeably to its own principles.

The principles of evidence are founded on our observations on human conduct, on common life and living manners; they are not just because they are rules of law; but they are rules of law because they are just and reasonable.

It has been found, from common observation, that certain circumstances warrant certain presumptions. Thus, that a mother shall feel an affection for her child,—that a man shall be influenced by his interest,—that youth shall be susceptible of the passion of love,—are laws of our general nature, and grounds of evidence in every country. Of the two women who contended for their right to the child, she was declared to be the mother who would not consent to its being divided betwixt them. When Lothario tells us that he stole alone, at night, into the chamber of his mistress, “hot with the Tuscan grape, and high in blood!” *Cætera quis nescit?*

As the principles of evidence are founded on the observations of what we have seen, or believed to have been passing in real life, they will accordingly be suited to the state of the society in which we live, or to the manners and habits of the times. The following passage in the excellent memoirs of Philip de Comines, I believe to be perfectly true, because it is confirmed by other accounts of the general state of manners at the period when he wrote.

Louis XI. distributed, he asserts, for corrupt purposes, six-

the way in which the stolen property came into his possession, whether that explanation is supported by evidence or not, is altogether for the consideration of teen thousand crowns among the King of England's officers that were about his person, particularly to the chancellor, the master of the rolls, the lord chancellor, &c.

The truth of this narrative has never been called in question, because it is given by an historian of great gravity and character, and is illustrated by the manners of the age; yet although the author says that his design in writing of these transactions, is to show the method and conduct of all human affairs, by the reading of which such persons as are employed in the negotiation of great matters, may be instructed how to manage their administrations, we should find it difficult to give credence to such facts, if related of any modern lord high chancellor or officer of state of the court of England. Thus, the same presumptive evidence that is good as to the court of Edward IV. and the era of 1477, is altogether extravagant if applied to the court of George III. and the beginning of the 19th century.

The oration of Cicero for Cluentius, exhibits evidence of judicial corruption which can only be credited from our general knowledge of Roman manners at the era of the facts which he describes.

The King of Siam gave credence to everything which a European ambassador told him, as to the circumstances and condition of Europe, until he came to acquaint him that the rivers and sea were occasionally made so hard by the cold that people could walk on them; but this story he totally disbelieved and rejected, as entirely repugnant to everything which he had either seen or heard; and the ground of his disbelief was perfectly rational.

A similar principle sways our belief in respect to the acts of individuals, as arising in the society and period in which we live. We always refer the credibility of the case to what has fallen within our own observation and experience of men and things. We readily give credence to acts of common occurrence, and are slow in yielding our assent to the existence of new and unlooked-for events. When a wretch, at no distant period in affluent circumstances, was accused of having stolen some sheets of paper in a shop, the judges admitted him to bail against evidence, because the charge was altogether unlikely in one of his condition in life. From these instances, we may safely infer that the principles for our believing or

the jury. And here it is necessary to point attention to an important distinction. In *R. v. Crowhurst*, (a) which was an indictment for larceny, Alderson, B.,

(a) 1 Car. & K. 370.

disbelieving any fact, are rather governed by the manners and habits of society than by any positive rule. The writers on the general law of evidence, such as Mascardus and Menochius, have accordingly declared that all proof is arbitrary, and depends on the feelings of the judges.

There are two species of presumptive proof: the first is the presumption of the law, and the second the presumption of the judge, juryman, or trier.

The presumption of the law is that conclusion which the law attaches to a certain species of guilt. Thus, that he who has deliberately and willfully killed another, has done so from malice, is a presumption of the law. But how far he who has been found with the sword in his hand by the body of the man just killed, did or did not give the mortal stroke, is a presumption to be made by the jury, and is not determinable by any positive rule of law.

The presumption of the law, Montesquieu observes, is preferable to that of man. The French law considers every act of a merchant, during the ten days preceding his bankruptcy, as fraudulent; this is the presumption of the law.

The modern French code has widely decreed that when the law, on account of circumstances, shall have deemed certain acts fraudulent, proof shall not be admitted that they were done without fraud. And in our own, as in every other system of legislation, a variety of qualities are presumed as to different persons and things, against which no proof shall be allowed. Certainty is the great object of legislation, and nothing could be established but by the determination of some thing as already fixed.

All proof is in reference to some fact already known and admitted,—what is doubtful must be proved in reference to what is true.

The following rules, by Quintilian, proceed upon this principle, but they are, perhaps, rather curious than useful: One thing is, because another is not; it is day, therefore it is not night. One thing is, therefore another is; the sun is risen, therefore it is day. One thing is not, therefore another is; it is not night, therefore it is day. One thing is not, therefore another is not: he is not rational, therefore not a man.

before whom the case was tried, thus directed the jury—"In cases of this nature you should take it as a general principle that, where a man in whose possession

Evidence is divided into positive and presumptive. Positive evidence is where the witness swears distinctly to the commission of the act or crime which forms the subject of the trial. Presumptive evidence is that conclusion which the jury draw for themselves, from circumstances or minor facts, as sworn to by the witnesses.

Presumptions are consequences drawn from a fact that is known to serve for the discovery of the truth of a fact that is uncertain, and which one seeks to prove. But no presumption can be made but on a fact already known and ascertained. Thus, if the stains of blood on the coat of one tried for murder, are to be presumed as evidence of his guilt, the fact of the stains being occasioned by blood must be first distinctly ascertained; the one presumption cannot be made to aid the other.

The stains are not to be presumed from blood because he is presumed to have been the murderer; nor, on the other hand, is he to be believed the murderer, because the stains are believed to be from blood; for this is reasoning in a circle, and returning back to the point whence the argument commenced. In laws, the argument should be drawn from one reality to another, and not from reality to figure, or from figure to reality.

Whilst dwelling on the general head of proof, it may be proper to inquire in what does proof naturally consist. Is one witness, according to the principles of natural reason, sufficient to give legal credence, or are two witnesses necessary?

The Roman or civil law has required two witnesses to each separate fact.

But this principle did not, perhaps, arise from the dictates of legal prudence, but was borrowed from a text of Scripture: "In the mouth of two or three shall the truth be established." The text was meant merely to carry reference to certain circumstances incident to the Christian religion. But the principles of religion are happily founded on higher evidence than is necessary to guide men in the business of common life.

The incidents of commerce, and the daily intercourse of mankind require not only that moral certainty which we are warranted, from general observation, to confide in. It were

stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known superfluous to show how difficult it must be, nay, how impossible, often, to prove a crime by two witnesses. The absurdity and inconveniency of the rule has been attended with that effect which will always attend an inconvenient law; a variety of shifts have been invented to evade it. One witness is held sufficient to a fact of a general nature, and half proofs have been established.

If the rules of evidence are founded on the principles of human nature; if, like other rules, their fitness is to be judged of by their practical utility, it must be admitted that a proof by one witness, or by circumstances, in certain cases, is good and reasonable.

It is true, that by the English law of high treason, that is, by the 25th of Edward the Third, two witnesses are required to convict a prisoner of the charge: that is to say, one witness to one fact, and another to a different fact, of the same species of treason, shall be held to be two witnesses within the meaning of the statute. But this law was passed for the security of the subject, and to guard against the overbearing influence of the crown in state prosecutions; and it is no doubt in reference to crimes against the state, that Montesquieu has made the following observation:—"Those laws which condemn a man to death, on the deposition of a single witness, are fatal to liberty. In right reason there should be two; because a witness who affirms, and the accused who denies, make an equal balance, and a third must incline the scale."—Besides, the observation is made by a writer speaking in reference no doubt to the civil law, where there is no jury to estimate the weight due to the evidence. In the present Essay, it is not meant to inquire, what crimes should be liable to the punishment of death, and what not; it is only proposed to inquire, what degree of proof is sufficient to satisfy the mind of the commission of act. The principle in law is clear, that the guilt is neither increased nor diminished by the fullness or defect of the proof.

When, it will be asked, shall a proof be said to complete? The answer must be,—when the judges are satisfied; if the process be regular. For what is implied by the term to prove?

The jurists acquaint us, that to prove is to convince the judge.

*Probare est fidem facere judici.* And this is the meaning

to be a real person, it is incumbent on the prosecutor to show that that account is false ; but if the account given by the prisoner be unreasonable or improbable assigned to the term by the English language. The common saying, as used in argument, where a fact is disputed—I will prove this to you,—I will convince you of this,—I will satisfy you on this head,—sufficiently show, that to prove, only implies, to convince another of the truth of our assertions.

The proof must be held to be complete, on the part of the prosecutor, when he produces the best evidence which the case will afford, and such as shall induce the judges to believe the commission of the fact, until it is refuted by opposite evidence on the part of the defendant : one story is good, until another is told. Where the evidence is believed, and is sufficient to account for the fact, no other proof is necessary.

Hypothetical reasonings are susceptible of the highest degree of evidence, when the hypothesis explains many phenomena, and contradicts none ; and, when every other hypothesis is inconsistent with some of the phenomena. And this is the principle on which the philosophy of Sir Isaac Newton, as to the motion of the heavenly bodies, is founded.

Where there is no reason not to believe, that alone is a reason for believing the evidence of our senses.

The senses are ever true, but the understanding often reasons ill. It is not proper to reject a probable opinion, without establishing a better in the room of it.

But these remarks are, after all, but barren generalities ; and the observation of the great writers on this subject, will too often be found to be just,—that all proof is arbitrary, and cannot be reduced to positive rules. It happens, sometimes, that the most probable things are false ; for if they were always separated from falsehood, they would be certain, and not probable. Or, as rendered by some other translators,—

The most probable things, sometimes prove false ; because, if they were exempt from falsity, they would not be probable, but certain.

It is likely several things may happen, which are not likely.

The ancient Romans were so sensible of the uncertainty of evidence, and the difficulty of always ascertaining the guilt of the prisoner, that their form of judgment (or verdict of the jury as we should style it), merely expressed, that he appeared to have done it, *fecisse videtur*.

It is not the fact, always, that constitutes the guilt, but the

on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing this watch, and I were to say I opinion of the judge. "What have the laws ordered in such a case?" was asked of an advocate of Byzantium: "What I please," was the answer.

The end of a proof, is to establish the matter in debate. In every case, whether by direct proof, or by that of circumstantial evidence, the jury ought always to be fully satisfied of the guilt of the prisoner, before they return such a verdict. It is immaterial what the proof is, if it is not believed, and brings conviction to the mind of the jury.

It has been, of late years, a favorite theme, to descant upon the certainty of circumstantial evidence. The practice of the law, like other things, has its prejudices; and the name of an eminent man, the success of a particular trial, will sometimes give sanction to a false theory.

Circumstances, it is said, cannot lie. This is very true; but witnesses can. And from whom do you obtain circumstances, but from witnesses? Thus, you are liable to two deceptions: first, in the tale told by the witness; and, secondly, in your own application of those circumstances. Where a fact is positively sworn to, as seen by the witness, the conclusion or inference to be drawn from it, is generally obvious. But, where the inference is to be drawn from a long train of circumstances, it is a matter of judgment; it is an exercise of the understanding; and, as all men do not understand alike, very opposite conclusions are sometimes drawn from the same shades of probability.

When the ancient prudence of the law denied to a prisoner the benefit of counsel, on a capital charge, to plead for him, it was understood that the proof should be so clear as to be self-evident to the jury. It was understood that the judge should be counsel for the prisoner; that is to say, that he should see that the process was fair and regular, and that no undue advantages were taken; but that process is vitiated in its vital part, when a false principle is introduced.

"A presumption, which necessarily arises from circumstances, is very often more convincing and more satisfactory than any other kind of evidence; it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part, not all, of these circumstances."

bought it from a particular tradesman, whom I name that is, *prima facie*, a reasonable account, and I ought not to be convicted of felony unless it is shown that (Charge of Mr. Justice Bullen, on the trial of Captain Donnellan.)

I deny the position. I maintain that the theory is repugnant to the received principles of jurisprudence, as known to the best foreign writers on the law of evidence. I maintain that it is not warranted by experience,—the greatest proof of every rule, the proof of proofs. And I may further assert that it is new to the practice of the English law.

First, I shall show that the theory is repugnant to the received principles of jurisprudence, as known to the best foreign writers on the law of evidence.

The first to whom shall I refer is Mascardus, a writer of great eminence on the general theory of proof; regarding which, he has published four volumes.

“Proof by evidence of the thing is superior to every other; and of all different kinds, none is so great as that which is made by witnesses deposing to what they have seen.”

“Proof by presumption and conjectures,” he observes in another place, “cannot be called a true and proper proof.”

The work of Menochius is entirely dedicated to the doctrine of presumptions or circumstantial evidence; and although he displays the partiality for this species of proof, which is natural to one who has dedicated his attention to a particular subject, yet, in the very first chapter of his work, he observes that “the proof or credence which arises from the testimony of witnesses is superior to any other.”

I shall not think it necessary to load this Essay with quotations from other writers on the civil law; the above two possess the most eminent authority of any on the subject of evidence. But the same opinion is expressed by every other author whom I have had occasion to consult; no one has maintained the absurd position that circumstances cannot lie, or that conjectural proof is superior to that of ocular demonstration.

Secondly. I maintain that it is not warranted by experience—the great test of every rule.

It might appear invidious to carry reference to cases of modern occurrence, where fatal mistakes have been discovered of persons too hastily convicted on mere circumstantial evidence; the history of the judicial proceedings in this and every other country will afford too many illustrations.



that account is a false one." This doctrine is confirmed by the cases of *R. v Smith* (*b*) and *R. v. Harmer*. (*c*) The subsequent case *R. v. Wilson* (*d*) may

(*b*) 2 Car. & K. 207.

Some cases of this kind will be found well illustrated in Lord Chief Justice Hale's *Pleas of the Crown*, vol. 2, p. 289.

Various instances occur, of the fatal error being too late discovered; but who can say how many instances have occurred where the mistake has never been discovered?

It has often happened that the real murderer has confessed the fact for which the innocent man has suffered; but, as real murderers do not always confess when innocent men suffer, it is impossible to say to what length this dangerous doctrine may have been carried.

Thirdly. I have further to observe, that this principle is new to the practice of the English law.

That great collection of criminal cases, which bears the name of the *State Trials*, contains a great fund of criminal knowledge.

The opinions of the judges, however, as expressed in state prosecutions, are not always to be regarded as law, until we reach the period of the revolution.

New enactments of the legislature have changed some part of the law, and the improving experience of time has altered others. The first notice to be found of this principle, in sound and wholesome times, is on the trial of Miss Blandy, for poisoning her father,—before Mr. Baron Legge, in 1752.

The judge, in summing up the evidence to the jury, declares that circumstances are more convincing and satisfactory than any other kind of evidence; because "facts," he says, "cannot lie."

That facts cannot lie, is sound logic, no doubt. Men only lie. But as we only know facts through the medium of witnesses, the truth of the fact depends always upon the truth of the witness; so that, although he furnishes us with a thousand facts, it is of no consequence, if he himself is unsound.

The next occasion on which this doctrine appears is on the celebrated trial of Captain Donnellan, in 1781, before Mr. Justice Buller, in the passage already quoted. But he has altered the position a little, by shifting the criterion from facts to circumstances. Facts, before, were the standard of truth; circumstances are now made to be so. For circumstances

at first sight seem at variance with it, but is not in reality ; for although in that case *R. v. Crowhurst* and *R. v. Smith* were cited, the decision of the court

(c) 2 Cox, Cr. Cas. 487.

(d) 1 Dears. & B. 157 ; 7 Cox, Cr. Cas. 310.

cannot lie. But what else are circumstances but facts, or minor facts ; and I must take the liberty to say, that circumstances are still more liable to deceive, or to lead to deception, than even facts. A fact being more an object of sight, is easier apprehended by the senses than a circumstance, which, from its triviality, often escapes the attention altogether, is misapprehended, or assigned to a wrong cause.

The trial in question will afford a most unparalleled illustration of the truth of this observation ; it will show the fallibility of circumstances, and the very opposite conclusions which different men will draw from the same appearances.

I shall here give the general shape of the case :

If shape it might be called, which shape had none,  
Or substance might be called, which shadow seemed.

Sir Theodosius Boughton, a young man of a delicate constitution, had sent to a country apothecary shop for a draught of medicine. Different vials appear to have been in his chamber at the time he took the draught ; which was intended to be a composition of rhubarb, jalap, and lavender water.

He was suddenly seized with convulsions in his stomach, and foaming at the mouth ; and expired before he could give any explanation. On rinsing one of the vials, the sediment gave the effluvia of laurel water, which is known to be a strong poison. Convulsions, foaming at the mouth, and sudden death are the natural effects of that liquid.

But every man who dies in that way is not, therefore, poisoned. The apoplexy will produce the same effects and appearances ; of which disease the father of the young man was known to have died. No evidence whatever was produced as to the existence of the laurel water.

Captain Donnellan, the brother-in-law of Sir Theodosius, was living in his house at the time of the accident. He was the next heir to the estate, and, accordingly, the person who had the most immediate interest in his death. He certainly betrayed some uneasiness on the event, and appearances indicated that he was afraid of being suspected as the author of the mischief. But, it if was natural that he should be sus-

turned simply on the question, whether the whole evidence taken together was sufficient to justify a conviction.

pected, if the *cui bono* points out the actor of a nefarious deed, it was not unnatural that he should find himself placed in circumstances of peculiar delicacy, and manifest embarrassment and confusion in his conduct.

Captain Donnellan was brought to trial, on a charge of poisoning Sir Theodosius Boughton.

The leading point in every case of this sort, is—did the deceased die of poison? For, if he did not, there is an end of the whole. Where there was no poison, there was no poisoner.

But this was altogether a question to be decided by the opinion of medical men. From what then did they form their opinion? From any of those broad marks, respecting which all men judge alike. No; there was nothing of the kind to guide their judgment. The whole cause turned on circumstances, from first to last. Presumptions were formed on conjectures; and conjectures supposed from circumstances never proved. Four physicians inspected the body, on dissection, the eleventh day after the death. They gave their opinion to the jury, and described the circumstances on which that opinion was founded; those four said, they believed him to have died of poison.

The circumstances on which they had given their opinion were stated, at the trial, to Doctor John Hunter, the most eminent physician of the age. He declared he could not discover, in any of those circumstances, nor in all of them united, any sign of the deceased having died from poison, nor any symptoms beyond those incident to a man dying suddenly.

Q. from the court to Mr. Hunter. Then, in your judgment, upon the appearance the gentlemen have described, no inference can be drawn from thence that Sir Theodosius Boughton died of poison? A. Certainly not: it does not give the least suspicion.

In questions of science, and above all, in those of medical science, the faith to be reposed in any opinion will be regulated by the professional eminence of the person giving it. One man's sight being generally as good as that of another, as to a mere matter of fact; as whether he saw, or did not see such a thing, the learned and the ignorant are upon a par, and one witness to a fact is just as good as another. But the case is very different as to a matter of science; for one man's judg-

ment will outweigh that of many. Upon a point of law or equity we would not put the opinion of a country attorney, or of four country attorneys, against that of a chief justice. Doctor John Hunter stood, at that time, at the very head of his profession; his opinion gave the law to that profession, both in England and in every country in Europe. Had the profession been to estimate his opinion, and not the jury, a very different verdict would have been given. The case referred peculiarly to Dr. Hunter's line of study,—that of dissection, and the appearances incident to a body on sudden and convulsive death. He pronounced, that the dissection had been irregularly made, and in a way not to afford the true criterion to judge by. And, where the process is irregular, when the experiment is defective, the conclusion must always be vague and doubtful.

The gentlemen composing the jury did not perhaps know the eminence of Mr. Hunter's character; nor, consequently, the weight due to his opinion. But the judge, on the bench, no doubt knew this; and in balancing the evidence, and in summing up, it was clearly his duty to have stated the great weight to be attached to Mr. Hunter's observations. He stated nothing of all this; but took them numerically, "four medical men to one."

Thus, from an irregular dissection, a positive conclusion was admitted.

It is a rule of law, and above all in cases of life and death, that the want of any one circumstance will prevent the effect of the whole. Thus, if the dissection were irregular, the opinion formed in reference to that dissection was a mere nothing. As well may you suppose that proposition itself to be true, which you wish to prove, as that other, whereby you hope to prove it.

Post hoc; ergo propter hoc—a species of argument which often leads to fallacy.

Because the fact immediately followed; therefore it was occasioned by that which it followed. He died immediately after taking the medicine; therefore, he was killed by the medicine.

The present question is, was the process on the trial according to law? Was the conclusion arrived at by regular and legal forms? The grounds on which the legal inference is to be drawn, must always of themselves be clear and certain; there is no presumption upon a presumption; there is no inference from a fact not known.

When the judgment of the law is passed in reference to a

certain thing, the existence of that thing should be first clearly made to appear.

The fact of poisoning ought to have been established beyond a shadow of doubt, before any person was convicted as the poisoner.

But the jury, it will be said, were satisfied on this point. Had the evidence been duly summed up by the judge; had they been told, as they ought to have been, that in experimental philosophy, such as tracing the effects of a particular poison, in tracing the causes, so many and so complicated that lead to death, if the experiment is defective, if the process is vitiated in one instance, the result is also vitiated and defective. Every practitioner in philosophy is sensible and aware of this truth; and wherever he finds that he has erred in his experiment, he sets the case aside, as affording no satisfactory result, and renews his process in another subject.

But, unfortunately, it is a matter of pride, in some men, to be always certain in their opinion, and to appear beyond the influence of doubt. Very different was the practice of that modest and eminent man who gave his evidence on this trial: he was accustomed to the fallaciousness of appearances,—to the danger of hasty inferences from imperfect proofs, and refused to give his assent to an opinion, without facts being first produced to support it. “If I knew,” said Mr. Hunter, “that the draught was poison, I should say, most probably, that the symptoms arose from that; but when I don’t know that that draught was poison, when I consider that a number of other things might occasion his death, I cannot answer positively to it.”

During the whole course of this celebrated trial, there was not a single fact established by evidence, except the death, and convulsive appearances at the moment. These appearances, Mr. Hunter declared, offered no suspicion whatever of poison, and were generally incident to sudden death, in what might be called a state of health; not only there was no fact proved, but there was not one single circumstance proved. One circumstance was supposed from another, equally suppositious, and from two fictions united a third was produced. The existence of the laurel water was thus made out: the sediment found in the vial, from which the unfortunate young man had drunk, was supposed to smell like bitter almonds; for, as the smell of laurel water was not then known to Lady Boughton, she could not trace the resemblance further; bitter almonds were supposed to smell like laurel water.

It is here to be observed, that the smell attached to the vial

was momentary, for it was washed out almost immediately, and could not be twice experienced. But what so uncertain as the sense of smell? Of all the human senses, it is the most uncertain, the most variable, and fallacious. It is often different to different men, and different in the same person, at one hour, from what it is at the next; a cold, a slight indisposition, the state of the stomach, a sudden exposure to the air, will extenuate or destroy this impression.

But this train of proof was altogether at variance with principles. In law, as already observed, the arguments should be drawn from one reality to another; but here, the argument turned upon the breath, the smell of a woman, distracted at the moment with the loss of her son, and ready to ascribe that evil to the first thing that came in her way.

All proof must begin at a fixed point. The law never admits of an inference from an inference. Two imperfect things cannot make one perfect. That which is weak may be made stronger; but that which has no substance cannot be corroborated. The question is never what a thing is like; but the witness must swear to his belief as to what it is. A simile is no argument. Upon the principle that comparison of hands is no evidence, in a criminal trial, comparison of smells must be held to be equally defective. Besides, there are a variety of articles that resemble bitter almonds in the smell, and many of these altogether innoxious.

In circumstantial evidence, the circumstance and the presumption are too often confounded; as they seem to have been throughout this trial. The circumstance is always a fact; the presumption is the inference drawn from that fact. It is hence called presumptive proof, because it proceeds merely on presumption or opinion. But the circumstance itself is never to be presumed, but must be substantially proved. An argument ought to consist in something that is itself admitted; for who can prove one doubtful thing by another? If it was not laurel water that Sir Theodosius drank, the proof fails as to the effect; and, certainly, some of the usual proofs, some of the common indicia or marks of things, should have been established. Where did the prisoner procure it? From whom did he obtain it? Where, and what time,—and by whom, or how did he administer it! Nothing of this kind was proved.

The whole proof, as to laurel water, rested upon the comparison of the smell. Question to Doctor Parsons, "You ground your opinion upon the description of its smell by Lady Boughton?" Answer. "Yes, we can ground our opinion upon nothing else but that, and the subsequent effects."

But the judgment of the cause from its effects, Mr. Hunter has already shown to be equally conjectural as that formed from its resemblance in smell.

The proof proceeds. He was supposed to be poisoned, because it was believed to be laurel water; and it was believed to be laurel water, because he was supposed to be poisoned. We will not say that both these suppositions might not have been true; yet still they were but conjectures, unsupported by any proof, and formed against all the rules of law.

But the accused, it is said, furnished the proof against himself, by his own distrust of his innocence. He no doubt betrayed great apprehensions of being charged with the murder; but are innocent men never afraid of being thought guilty?

We readily recognize all the general truisms and commonplace observations as to the confidence of innocence and the consciousness of guilt; but, we find, from history, that innocence loses its confidence when oppressed with prejudice; and that men have been convicted of crimes which they never committed, from the very means which they have taken to clear themselves.

“An uncle who had the bringing up of his niece, to whom he was heir-at-law, correcting her for some offense, she was heard to say, ‘Good uncle, do not kill me;’ after which time she could not be found; whereupon the uncle was committed upon suspicion of murder, and admonished, by the justices of the assize, to find out the child by the next assizes; against which time he could not find her, but brought another child, as like her in years and person as he could find, and apparelled her like the true child; but on examination she was found not to be the true child. Upon these presumptions (which were considered to be as strong as facts that appear in the broad face of day), he was found guilty and executed; but the truth was, the child, being beaten, ran away, and was received by a stranger; and afterwards, when she came of age to have her land, came and demanded it, and was directly proved to be the true child.

The above case was referred to by Lord Mansfield, in his speech in the Douglass cause, as an illustration that forgery, and falsehood itself, has been sometimes used to defend even an innocent cause. “It was no uncommon thing,” he observed, “for a man to defend a good cause by foul means or false pretenses.”

Captain Donnellan was liable to suspicion, and to great suspicion, on the general relations of the subject, independent

of particular circumstances, and would have been suspected by all the world, had he been never so innocent.

In the first place, it was a well-known fact, that he had been obliged either to quit the army (to which he originally belonged), or had been cashiered by the sentence of a court-martial.

Secondly, he was of all other men the person who was to have gained by the death of Sir Theodosius Boughton; to whose estate and property he succeeded as his brother-in-law. No other human being had an interest in the case. Such is the disposition in human nature (founded perhaps on a too just knowledge of our feelings and principles of action), that first suspicion always points to the person who is to gain by it, as the author of any mischief of which the real perpetrator is not known. The *cui bono* was not invented by Cassius Severus, to whom it is ascribed,—but every man is alike the rock of the accused, in this respect.

If, therefore, it was natural, on general grounds, that Mr. Donnellan should be so suspected, it was also natural for him to be sensible that he would be so, and consequently, to be alarmed, distracted, and uneasy.

But it will be said, that, granting all this, he displayed more uneasiness than was even natural to one in his situation. It is a delicate thing to answer this question,—it is a nice thing to fix the standard of human feelings,—and to say what degree of perturbation a man, already branded with guilt and conviction, shall feel when placed under circumstances which make him to be suspected of a capital crime.

Lawyers, and those accustomed to see and advise with persons in that unfortunate predicament, only can tell the terrible apprehensions that every man feels at the idea of being a second time brought to a public trial; it is altogether a new view of human nature, and we seldom estimate, rightly, feelings which we have never experienced, nor expect to experience in our own persons, nor have witnessed in that of other persons;—

“To thee no reason,—

Who good has only known, and evil has not proved.”

They who have been accustomed to carry on criminal prosecutions, must be fully aware of the influence which a former trial and conviction is calculated to have on almost any accusation; but in no case can that influence be greater than where the trial turns on presumptive proof. For here it



is often the feelings, the prejudices, and opinion of the jury, that supply the want of evidence.

Suspicion is to be distinguished from proof,—a thousand suspicions do not form one proof. We understand, in common language, by the term suspicion, the imagining of something ill, without proof. It may, therefore, form a proper ground of accusation, but never of conviction: it seems to arise from the general semblance of things, and often from the morals of the individual, rather than from any distinct act. Thus in the civil law, a guardian is regarded as suspected, whose morals render him so.

A suspicion is one thing, and a necessary inference another: a suspicion is an impression on another man's mind;—an inference is made from the fact itself.

There certainly was no overt act proved against the prisoner during the whole course of this trial; it was not proved that he gave the poison or saw it given, or had such in his possession. Many things, no doubt, in his demeanor and conversation, gave strong suspicions against him; but, if the civil law positively forbids a man being condemned on suspicion, can that be justified by ours?

“The wisdom and goodness of our law appears in nothing more remarkably, than in the perspicuity, certainty, and clearness of the evidence it requires to fix a crime upon any man, whereby his life, his liberty, or his property can be concerned: herein we glory and pride ourselves, and are justly the envy of all our neighbor nations. Our law, in such cases, requires evidence so clear and convincing, that every bystander, the instant he hears it, must be fully satisfied of the truth and certainty of it. It admits of no surmises, innuendoes, forced consequences, or harsh constructions, nor anything else to be offered as evidence, but what is real and substantial, according to the rules of natural justice and equity.”

We have been the more full in our observations on this trial, because it has been so often quoted with a sort of triumph, as forming a model and illustration of the nature of circumstantial evidence. It is an illustration, indeed, of how little evidence one man has been convicted on; but it is an illustration of nothing else.

We can never bring ourselves to believe, that it is necessary to forfeit the life of a man on bare suspicion, on presumptions without proof, and on inferences unsupported by evidence.

A rule of conduct, to be good, must be so on general

grounds, and in reference to the state of society in which we are placed; and, happily, the wholesome state of British morals does not require that men should be convicted on any evidence but that which is established by law, and warranted by sound reason.

The mischief of a nice conviction does not rest with the particular case; precedents are grounds of law by the English practice, and indeed the most general ground of our law of evidence.

We have, in more than one instance, witnessed the doctrine of circumstantial evidence being hastily applied by loose analogies and incidents, foreign to the intrinsic conditions of the subject. But we do not feel ourselves at liberty to hurt the tenderness due to living reputation, by recurrence to recent instances; we adopt the more agreeable duty of bearing testimony to the wise maxim of an eminent magistrate: "Nothing can be more dangerous or unjust, in matters of this nature," says Mr. Chief Justice Hyde, speaking of homicide, "than to establish material distinctions upon points which do not enter into the intrinsic merits of the case." *East's Pleas of the Crown*, p. 241.

The evidence of circumstances on every criminal trial, should be confined as much as possible to the actual commission of the fact.

The intention, indeed, must always precede the act, and is chiefly to be judged of by the antecedent circumstances. But then each of these circumstances should be regarded as a fact to be proved and established by evidence, and, unless so established, ought never to form a ground of conviction. We must once more revert to the trial for illustration. On passing sentence, Mr. Justice Buller conveyed the following opinion as to the motives: "Probably the greatness of his fortune caused the greatness of your offense; and I am fully satisfied, on the evidence given against you, that avarice was your motive, and hypocrisy served you with the means."

But where or how was this proved by evidence on the trial? The speech of a judge is to be taken out of the evidence adduced on the trial; if it is not so limited, it may be difficult to fix its bounds.

In a criminal trial, and more especially in the trial for a capital offense, everything is supposed to be governed by fixed and known rules. There is here no room for the discretion of a judge; the proof by which a prisoner is to be tried is as fixed as the law which condemns the crime; at least, the principles of that proof are to be stated by the judge to the jury,

as known and received maxims of reason, handed down by a long train of precedents, or fixed by statutory enactment. "Whatever the rules in Westminster Hall are, it is not therefore reason because it is a rule; but because it is reason, and reason approved of by long experience, therefore it is a rule." (State Trials, vol. 4, p. 291.) The opinion of Mr. Justice Buller might have been very just, but if it was not regularly formed; it was extra-judicial and of dangerous example.

It is an observation warranted by the history of our criminal law, that all the instances by which innocent men have lost their lives, have arisen from precedents against guilty men; but laws were meant to protect the innocent, as well as to punish the guilty.

The following observation by Lord Bacon suggests the caution with which men should give their assent to any proposition founded on a mere similarity of circumstances: "The mind," he observes, "has this property,—that it readily supposes a greater order and conformity in things than it finds; and although many things in nature are singular, and extremely dissimilar, yet the mind is still imagining parallel correspondence and relations betwixt them which have no existence.

"Nor does this folly," he adds, "prevail only in abstract tenets, but also in simple notions." (Novum organum, s. 2, aphorism 45.)

Every one may prove the justice of these remarks by his reflections on what he sees every day occurring in common life.

Weak men are always the first to assent and to admit of loose analogies, imperfect resemblances, and inferences without proof,—whilst men of stronger minds and more reflection look out for distinctions; they search for discriminations in subjects nearly similar, and are slow in yielding their assent to first impressions. Judgment consists in distinguishing things which are nearly alike, without exactly being so.

In the general prejudice which at present prevails for circumstantial evidence, the mind, I am afraid, is rather disposed to look out for analogies and resemblances, than for discrimination.

In almost every trial, it is the interest of the accuser to accumulate his proofs, whilst the safety of the prisoner consists in considering these, separate and apart; this practice therefore, has a tendency rather to convict than to acquit.

We should lament to advance anything that might tend to weaken the facility of detecting crimes; but that facility may

be increased by establishing certain rules for the determination of proof.

Without presuming to state a body of general rules, we may be allowed to show where some obvious principles have been violated. All instruction proceeds safest by negatives and exclusives to what is positive and affirmative. And it was this principle which led us to dwell so particularly on the above case. We conceive one great error has arisen from the popular saying that circumstances cannot lie; from the idea that circumstantial evidence is equivalent to direct proof.

And, perhaps, from the vanity of forming resemblances where (if that passion in the judicial character is ever allowable), the vanity should rather be in perceiving distinctions.

Nothing is more dangerous in the mouth of a judge than popular brocards, barren generalities, and loose unsettled maxims, which carry away the attention of the jury from the intrinsic evidence of the case itself, and prevent the free exercise of their own understandings. It is not every jurymen that can understand a general theory, but every man of sense can compare what he hears at the trial, with similar circumstances, as falling under his own experience, and so estimate for himself the credibility of the evidence.

I deprecate an argumentative judge, reasoning a jury into a belief of guilt or innocence, rather than leaving them to judge from their own feelings; from those feelings which God and nature have bestowed on them, as the safeguard of innocence, and the true measure of human conduct.

The following observation, in the charge so often alluded to, deserves particular remark:—"It is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof, without affording opportunities of contradicting a great part, if not all, of these circumstances."

This is one of those general sayings which, coming from high authority, is allowed to pass without examination, and, from being often repeated, no one thinks to doubt of its truth. No other remark, however, was ever more refuted by experience. If the observation was just, we should find it illustrated by practice; but we know that there are infinitely more instances of mistaken convictions on circumstantial evidence, than by any other species of proof whatever. "Reducing general words to particular facts, clears the sophistry of them."

I beg here to dwell, a little more minutely, on the hard-

ship of requiring a prisoner to controvert a train of circumstantial evidence. For, how can a prisoner, altogether innocent of the charge, controvert circumstances, or an account of events, with which he is unacquainted. A man, charged with the commission of a crime, at a period long anterior to the trial, if innocent, and at a distance from the place at the time of its occurrence, can only establish his innocence by one of two methods:—first, by showing a contradiction in the circumstances of the proof itself; or, secondly, by establishing an alibi,—that is, by showing that he was at a different place at the time. In regard to the first mode of refuting the charge: if he is ignorant of the facts, if he is unaccustomed to the nature of legal argument, he may not easily confute the chain of circumstances. A premeditated story is always so made up as to bear the appearance of consistency. Men will believe a probable falsehood rather than a singular truth; and, in regard to the proof of an alibi, if the prisoner does not happen to recollect the day, or cannot, perhaps, recall to mind where he chanced to be on that day, he is left without a defense. The proof of a negative is always difficult, often impossible.

But what is the situation of a person charged with a capital crime? Suspicions of this sort generally fall upon the needy and unfortunate. He is brought from a jail, where he has been perhaps long confined, distracted and agitated with his situation; he has none to assist him or suggest to him what course to pursue; and no counsel is allowed to plead for him, and assert his innocency of the facts charged. A long train of circumstances are offered by the witnesses, of the whole of which he is ignorant, and, therefore, unprepared to ask the necessary questions, or to point out to the jury the incongruity of the story advanced;—his very attempt to do so, unsuccessfully (that is to say, if he makes observations on the evidence, which are not explanatory or correct), will be held an argument of his guilt. But the facts have been sworn to, and his personal appearance is perhaps against him; and his character—it may be—suffering under prejudice. If a weak magistrate happens to sit on the bench (and weak men sometimes find their way to the bench, as well as to other places); if the judge is infirm, or his attention exhausted by the fatigue of a long trial; and if, in summing up, he loses sight of the chain of incidents, assumes a fact as established before it is so,—endeavors to prove facts by other facts which are not proved themselves,—forgets the attention which is due to the character of the witnesses, and has allowed the counsel

for the prosecution, in his opening speech, to prejudice and inflame the minds of the jury!—

It were superfluous to ask what the result of such a trial must naturally be. We hope, and believe, that such a concurrence of incidents, hostile to justice, is very uncommon.

But to return to the proposition in the charge; can it ever be admitted that the number of circumstances alleged against a prisoner, facilitates the refutation? Surely the difficulty of defense is increased by the multiplicity of proof that it has to contend with! The attention is distracted; and the very embarrassment incident to the occasion, is alone sufficient to bereave any common man of his faculties.

The civil law has foreseen the embarrassments which a prisoner must always be under, from a variety of witnesses being produced against him; and has, therefore, left it to the discretion of the judge to moderate their number. It might as well be said, that a prisoner has an advantage in the multiplicity of witnesses opposed to him, because if false he can always refute some of them.

But, if you break the chain of circumstances, it will be said, in one link, the whole structure falls to the ground. This, no doubt, ought to be the consequence. But is the fact so? Does experience warrant the observation? Are we to suppose that all those who have been irregularly convicted, made no defense, and broke no part of the chain? They must naturally have offered something to the consideration of the jury. Yet still, we see, that the general effect of the whole, the multiplicity of the circumstances, pointing against the prisoner, has been thought sufficient to warrant conviction.

It happens, not unfrequently, that a prisoner is not apprised of the evidence intended to be produced against him. If the case is altogether false on the part of the prosecution, the difficulty of defense is increased. For a man can only refute a false story, by being acquainted with some part of it. The true case must always be opposed to the false one. Thus, in the case of two men who were tried some few years ago, for the murder of Mr. Steele, on Hounslow Heath, a long detail of the circumstances attending the occasion was given in evidence against them. But if they were not, as they asserted, present on the occasion, and knew nothing of either Mr. Steele or the murder, how was it possible for them to refute or disprove the circumstances?

The accusation was not brought until some years after the murder. They could not bring to recollection where they were on that day, and so failed in establishing an alibi.

A different man has been since brought to trial for that very murder. It is true that the judges did not allow the evidence to be entered upon because they thought that it was insufficient on the statement of the counsel in his opening speech.

It should be always kept in mind, that circumstantial evidence is merely supplemental; and is only resorted to from the want of original and direct proof. And it never can be said that what is secondary is equal to that which is original,—the thing substituted equal to that which it is meant to supply.

And this distinction seems fully recognized by Lord Chief Baron Gilbert. "When the fact itself cannot be proved, that which comes nearest to the proof of the fact, is the proof of the circumstances that necessarily and usually attend such facts, and called presumptions; and not proof, for they stand instead of the proofs of the fact till the contrary be proved" (Gilbert's Law of Evidence, vol. 1, p. 142).

A regard to the peace and good order of society, certainly requires that crimes shall be liable to be proved by circumstantial evidence. But a regard to the well-being of society likewise demands that the mode of proof should be regulated by some fixed rules. If the nature of the thing admits of but few rules, for that very reason those few should be the more distinctly observed. This principle is excellently illustrated by the deep Gravina, who somewhere observes (for the book is not at hand for reference) that as the military state admits of but few laws, those few should be the more distinctly observed, as they could only have been introduced into an army or camp from a strong sense of their necessity.

Legal proceedings would be vague and uncertain, judges would become arbitrary, and innocence would be exposed to the resentment of witnesses, if some general and fixed rules were not observed for the discovery of truth.

Of these the following are perhaps the chief:

1. The actual commission of the crime itself (the *corpus delicti*) shall be clearly established.
2. Each circumstance shall be distinctly proved.
3. The circumstance relied on shall be such as is necessary or usually incident to the fact charged.
4. When the number of circumstances depend on the testimony of one witness, that number shall not increase the strength of the proof. For, as the whole depends on the veracity of the witness, when that fails, the whole fails.
5. Direct evidence shall not be held refuted from being

opposed to circumstances incongruous with that evidence. Because a certain degree of incongruity is incident to every man's conduct.

6. The judge, in summing up, shall assume no fact or circumstance as proved; but shall state the whole hypothetically and conditionally; leaving it entirely to the jury to determine how far the case is made out to their satisfaction.

7. The difficulty of proving the negative shall in all cases be allowed due weight. But the silence of the prisoner as to facts, which, if innocent, he might have explained, shall be held an argument against him. This, of course, proceeds upon the supposition that he stood fully apprised, before his trial, of all that was intended to be produced.

8. The counsel for the prisoner shall be allowed to object freely to the production of any evidence, as not proper to go to the jury, or as not being of legal credence. On Captain Donnellan's trial, the counsel do not appear to have always availed themselves of this privilege.

The liberty of objecting to any piece of evidence, ought, on every occasion, to be strenuously exerted; as supplying, in a great measure, the right of making the defense.

9. The jury shall be as fully convinced of the guilt of the prisoner, from the combination of the circumstances, as if direct proof had been brought.

It should always be considered whether the connection betwixt the circumstances and the crime is necessary, or only casual and contingent; and whether, therefore, the circumstances necessarily involve the guilt of the prisoner, or only probably so; whether these circumstances might not all exist, and yet the accused be innocent.

It seems desirable that some inchoate act, approaching to the crime, should be proved on the prisoner; and that he should not be convicted on general appearances,—such as from being found in a certain situation. The improper convictions seem chiefly to have been owing to a neglect of this rule. Strong appearances, but without any act proved against the prisoner, have too often turned out unfounded.

It is sometimes said, in summing up by the judge, that the evidence is the best that the nature of the case can be supposed to afford; but this, certainly, is no reason for the jury being satisfied with it. In the first place, the nature of the case is only to be known by the evidence. The case of an innocent man must always be of a nature to afford very little evidence; but the jury, let the case be what it will, must be distinctly persuaded of the guilt of the prisoner, before they return such a



verdict. Agreeably to the common law, where the facts have gone regularly before a jury, and there is no misdirection from the judge in summing up, the proof is complete. When the jury is satisfied, the law is satisfied. No principle can be at once more calculated to facilitate the detection of crimes, to ensure the safety of innocence, and to maintain the general peace of society.

10. Where the body of the act is distinctly sworn to, a variation in the circumstances does not destroy the proof. "If several independent witnesses, of fair character, should agree in all the parts of a story (in testifying, for instance, that a murder or a robbery was committed at a particular time, in a particular place, and by a certain individual), every court of justice in the world would admit the fact, notwithstanding the abstract possibility of the whole being false. Again, if several honest men should agree in saying that they saw the king of France beheaded, though they should disagree as to the figure of the guillotine, or the size of his executioner, as to the king's head being bound or loose, as to his being composed or agitated in ascending the scaffold, yet every court of justice in the world would think that such difference, respecting the circumstances of the fact, did not invalidate the evidence respecting the fact itself.

"When you speak of the whole of a story, you cannot mean every particular circumstance connected with the history, but not essential to it; you must mean the pith and marrow of a story; for it would be impossible to establish the truth of any fact (of Admirals Byng or Keppel, for example, having neglected or not neglected their duty), if a disagreement in the evidence of witnesses, in minute points, should be considered as annihilating the weight of the evidence in points of importance. In a word, the relation of a fact differs essentially from the demonstration of a theorem; if one step is left out, one link in the chain of ideas constituting a demonstration is omitted, the conclusion will be destroyed; but a fact may be established notwithstanding a disagreement of witnesses in certain trifling particulars of their evidence respecting it."

The following rule is the converse of the preceding one:

11. Where the leading fact or crime is only to be collected from circumstances, a material variation in these will defeat the effect of the whole.

For, as each particular is to have an effect on the general conclusion, a variation in the circumstances may give a different color to the whole transaction.

A system of propositions is only true, because each of the propositions of which it is composed is true.

12. There being no repugnance in the chain of circumstances, is a proof that a thing may be, not that it is; though there being a repugnance, is a proof that it cannot be. Whatever does not involve a contradiction, is possible; whatever involves one, is impossible.

13. The absence of the proof, naturally to be expected, is a strong argument against the existence of any fact alleged. This applies particularly to cases where violence is charged.

"It is an undoubted truth" (Lord Mansfield observed in the Douglass cause), "that judges, in forming their opinion of events, and in deciding upon the truth or falsehood of controverted facts, must be guided by the rules of probability; and as mathematical or absolute certainty is seldom to be attained in human affairs, reason and public utility require that judges, and all mankind, in forming their opinion of the truth of facts should be regulated by the superior number of the probabilities on the one side or the other, whether the amount of these probabilities be expressed in words and arguments, or by figures and numbers."

Applied to the affairs of civil life in reference to which the observation was made, the proposition is excellent; but the rule does not hold in criminal cases. The impression on the mind of the jury, in a criminal case, must be, not that the prisoner is probably guilty, but that he really and absolutely is so;—where they doubt, they are to acquit.

It is often said, in respect to evidence of this sort, if you break the chain of circumstances, the whole falls to the ground. It is material always, to be apprised of the meaning of terms, before we argue as to their effect. What is the import of the term? In what does this interruption consist? The Douglass cause turned entirely on circumstantial evidence; yet neither the speeches of the judges, nor the singularly acute letters of Mr. Stewart, on the subject of the trial, afford any solution of the term. The chain appears, on both sides of the question, repeatedly broken, and as often renewed; the want of the fact is supplied by argument, and the argument invalidated by the want of the fact, in endless proximity.

We hazard an explanation of it with great diffidence;—the chain of circumstances is broken, when there is such a defect in the thread of the narrative as cannot be accounted for, or such a contradiction in the statement as is irreconcilable with probability.

We will not add to the number of the above rules, lest we might appear to aim at forming a technical system for the belief or disbelief of facts, independent of the free exercise of the understanding over the circumstances of the case.

We must never bind ourselves down to believe or disbelieve, on general grounds, abstracted from the condition of times, persons, motives, and all the variety of relations of which the particular case happens to consist. Irregular, capricious, and shifting as man is in all his actions, we can never establish absolute grounds for judging of these.—Phillips.

And see as to presumptions: *State v. Davidson*, 30 Vt. 377; *Smith v. Commonwealth*, 21 Grat. 809; *State v. Keeler*, 28 Iowa, 553; *People v. Bennett*, 49 N. Y. 137; *Tyner v. State*, 5 Humphreys, 383; *State v. Lamb*, 28 Mo. 218; *Ruloff v. People*, 4 E. P. Smith (N. Y.) 179; *People v. Boorn*, N. Am. Review, vol. 10, p. 418; 5 Law Reporter, 195; 1 Greenl. on Evid. § 214; and see 1 Wh. & St. Med. J. (1873) § 200 a.; *State v. Traylor*, 4 Western Law Journal, 25; *Lamon's Life of Lincoln*, cited in 1 Wharton & St. Med. Jur. § 794; *Stocking v. State*, 7 Ind. 326; *U. S. v. Williams*, 1 Cliff. C. C. 5; *State v. Williams*, 7 Jones (N. C.) 446; *U. S. v. Hewson*, 7 Boston Law Reporter, 361—Story, J.; though see *Com. v. Harman*, 4 Barr. 269; *State v. Vincent*, 24 Iowa, 517; *People v. Wilson*, 3 Parker, C. R. 199; *Lowenstein's Case*, Wharton on Homicide, § 640, (note); *Pitts v. State*, 43 Miss. 472; *State v. Skate*, 5 Jones (N. C.) 420; *Commonwealth v. McKie*, 1 Gray, 61; *Commonwealth v. Andrews* (Pamphlet, 1868); *Hiller v. State*, 4 Blackf. 552; *State v. Thompson*, Wright's R. 617; *Sumner v. State*, 5 Blackf. 579; *Emmons v. Stahlnecker*, 1 Jones's Pa. R. 369; *Shultz v. State*, 13 Tex. 401; *Jane v. Com.* 2 Metc. (Ky.) 30; *State v. Collins*, 20 Iowa, 86; *People v. Shuler*, 28 Cal. 493; *State v. Waterman*, 1 Nev. 543; *State v. Dineen*, 10 Minn. 407; *Bowler v. State*, 41 Miss. 570; *People v. Brannon*, 47 Cal. 98; *O'Neil v. State*, 48 Ga. 66; *Malone v. State*, 49 Id. 210; *R. v. Jones*, 28 Up. Can. Q. B. 421; *Com. v. Harman*, 4 Barr. 270; *Pate v. People*, 3 Gilman, 644; *U. S. v. Foulke*, 6 McLean C. C. R. 349; *Giles v. State*, 6 Ga. 285; *State v. Schoenwald*, 31 Mo. 147; *Winter v. State*, 20 Ala. 39; *Com. v. Drum*, 58 Penn. St. 9; *Long v. State*, 38 Ga. 491; *State v. Porter*, 34 Iowa, 131; *R. v. Greenwood*, 23 Up. Can. Q. B. 258; *Com. v. Webster*, 5 Cush. 320; *Com. v. Goodwin*, 14 Gray, 55; see *R. v. White*, 4 F. & F. 383; *Pilkinton v. State*, 19 Texas, 214; *Donelly v. State*, 2 Dutch. (N. J.) 601; *French v. State*, 12 Ind. 670; *James v. State*, 45 Miss. 572; *State v. Os-trander*, 18 Iowa, 435; *Commonwealth v. Pope*, 103 Mass. 440;

Gardiner v. People, 6 Parker, C. R. 155; Davis v. State, 28 Md. 15; State v. Morphy, 33 Iowa, 270; State v. Porter, 34 Id. 131; Com. v. Lenox, 3 Brewster, 249; though see Wilson v. People, 2 Parker C. R. 619; Com. v. Twitchell, 1 Brewster, 566; Commonwealth v. Geisenberger, Wharton on Homicide, note, § 679; Champ v. Commonwealth, 2 Metc. (Ky.) 27; Davis v. State, 38 Md. 15; Gaines v. Commonwealth, 60 Pa. St. 319; State v. Knight, 43 Me. 11; People v. Gonzales, 35 N. Y. 49; Commonwealth v. Pope, 103 Mass. 440; Kennedy v. People, 39 N. Y. 245; People v. Lindsay (Pamphlet, Syracuse, N. Y. 1875); Hanby v. State, 35 Tex. 523; State v. Baron, 37 Vt. 57; State v. Collins, 20 Iowa, 86; State v. Staples, 47 N. H. 113; Toler v. State, 16 Ohio St. 583; State v. Brown, 25 Iowa, 561; Tyner v. State, 5 Humph. 383; Com. v. Goodwin, 14 Gray, 55; Campbell v. State, 23 Ala. 44; State v. Hays, 23 Mo. (2 Jones) 287; People v. Rathburn, 21 Wend. 509; Campbell v. State, 23 Ala. 28; Com. v. Hersey, 2 Allen, 173; Gardiner v. People, 6 Park C. R. 155; State v. Phillips, 24 Mo. (3 Jones) 475; Golden v. State, 25 Ga. 527; Fanning v. State, 14 Mo. 386; Whaley v. State, 11 Ga. 123; Revel v. State, 26 Id. 275; People v. Pitcher, 15 Mich. 397; State v. Staples, 47 N. H. 113; State v. Knapp, 45 N. H. 148; State v. Jerome, 39 Conn. 265; Hawser v. Commonwealth, 51 Pa. St. 332; People v. Schryver, 42 N. Y. 1; State v. Spencer, 1 Zabriskie, 202; Clark v. State, 12 Ohio, 495; Bonfante v. State, 2 Minn. 123. See Com. v. Eddy, 7 Gray, 583; Com. v. Rogers, 7 Metc. 500; State v. Lawrence, 57 Me. 574; Ferris v. People, 35 N. Y. 125; Walter v. People, 32 Id. 147; Flanagan v. People, 52 Id. 467; People v. McCann, 16 Id. 58; State v. Starling, 6 Jones (N. C.) 366; State v. Brandon, 8 Id. 468; State v. Hundley, 46 Mo. 414 (1870); State v. Klingler, 43 Id. 127; State v. Smith, 53 Id. 267; State v. Smith, Id. 270; State v. Hundley, 46 Id. 414; State v. McCoy, 34 Id. 531; People v. Coffman, 24 Cal. 230; State v. Felter, 32 Iowa, 50; McKenzie v. State, 26 Ark. 334; Lynch v. Com., cited in Com. v. Ortwein, Sup. Ct. Penn. (Jan. 1875, reported in Western L. J., March, 1875); Walter v. People, 32 N. Y. 191; People v. Garbutt, 17 Mich. 9; State v. Bartlett, 43 N. H. 224; Hopps v. People, 31 Ill. 385, qualifying Fisher v. People, 23 Id. 283; Chase v. People, 40 Id. 224; Ogletree v. State, 28 Ala. N. S. 701; State v. Crawford, 11 Kan. 32. Dove v. State, 8 Heisk. 348; Smith v. Com., 1 Duvall (Ky.) 224; Kriel v. Com. 5 Bush, 362; Polk v. State, 19 Ind. 170; State v. Marler, 2 Ala. 43; Bradley v. State, 31 Id. 492; Stevens v. State, 31 Id. 485; State v. Jones, 50 N. H. 370; Com. v. Hawkins, 3 Gray, 463

by Shaw, C. J., and by Curtis, J., in *U. S. v. Armstrong*, 2 Curtis, C. C. 446; *U. S. v. McClare*, 17 Bost. Law Rep. 439; *Kingen v. State*, 45 Ind. 518; *Gallahan v. State*, 21 Ohio St. 306; *Walker v. State*, 26 Ind. 290; *State v. Peters*, 2 Rice's Digest, 106; *State v. Town*, Wright's R. 75; *Woodside v. State*, 2 How. (Miss.) 656; *Conner v. State*, 4 Yerg. 137; *State v. Irwin*, 1 Haywood, 112; *People v. McLeod*, 1 Hill (N. Y.) 379; *U. S. v. Cornell*, 2 Mason, 91; *Com. v. Drew*, 4 Mass. 391; *Resp. v. Bob*, 4 Dallas, 146; *Penns. v. Honeyman*, Addison, 148; *State v. Zeller*, 2 Halst. 220; *State v. Merrill*, 2 Dev. 269; *State v. Smith*, 2 Strobb. 77; *Com. v. Hill*, 2 Gratt. 594; *U. S. v. Mingo*, 2 Curtis, C. C. 1; 7 Bost. Law Rep. 435; *People v. March*, 6 Cal. 543; *State v. Knight*, 43 Me. 11; *Riggs v. State*, 30 Miss. (1 George) 635; *Mitchell v. State*, 5 Yerg. 560; *State v. Johnson*, 3 Jones (N. C.) 266; *Green v. State*, 28 Miss. (6 Cush.) 687; *State v. Decklotts*, 19 Iowa, 447; *State v. Shippey*, 10 Min. 224; *Murphy v. People*, 87 Ill. 447; *Com. v. Knapp*, 10 Pick. 477; *Com. v. Stow*, 1 Mass. 54; *State v. Holme*, 54 Mo. 153; *Commonwealth v. Dana*, 2 Metc. 340; *Commonwealth v. Kimball*, 24 Pig. 366; *West v. State*, 1 Wis. 209; *Crilley v. State*, 20 Id. 209; *Henderson v. State*, 14 Tex. 503; *State v. MacClure*, 5 Lev. 502; *People v. Larned*, 7 N. Y. 448; *Commonwealth v. Hardiam*, 9 Gray, 136; *People v. Stonecifer*, 6 Cal. 405; *People v. Arnold*, 15 Id. 476; *State v. Morrison*, 3 Dev. 299; *State v. Crowell*, 25 Me. 171; *Wheat v. State*, 6 Mo. 455; *Smith v. Jeffries*, 9 Price, 257; *Sheldon v. Clark*, 1 Johns. 513; *U. S. v. Hayward*, 2 Gallison, 485; *Gening v. State*, 1 McCord, 573; *Farrel v. State*, 32 Ala. 557; *Hopper v. State*, 19 Ark. 143; *Mehan v. State*, 7 Wis. 670; *Com. v. Thurlow*, 24 Pick. 374; *Com. v. Boyer*, 7 Allen, 306; *People v. Bodine*, 1 Edm. (N. Y.) Sel. Cas. 36; *Barrett, in re*, 28 Up. Can. Q. B. 561; *Fife v. Com.*, 20 Pa. St. 429; *State v. Vincent*, 24 Iowa, 570; *Walker v. State*, 37 Tex. 367; *Adams v. State*, 42 Ind. 373; *Binns v. State*, 46 Id. 311; *Com. v. York*, 9 Metc. 93; *Benn. & Heard, Lead. Cas.* 504; *State v. McAllister*, 11 Shepley, 139; *State v. Upham*, 38 Me. 261; *Satterwhite v. State*, 28 Ala. 65; *Wasten v. State*, 18 Ga. 264; *Mitchell v. State*, 5 Yerg. 340; *Davis v. State*, 10 Ga. 101; *State v. Turner*, Wright, 29; *State v. Laliyer*, 4 Me. 368; *Hamby v. State*, 26 Tex. 523; *People v. Milgate*, 5 Cal. 127; *Com. v. Drum*, 58 Pa. St. 9; *Com. v. Hawkins*, 3 Gray, 463; *Com. v. Heath*, 11 Id. 303; *Tweedy v. State*, 5 Iowa (Clarke), 434; *State v. Knight*, 43 Me. 11; *State v. Bertrand*, 3 Oregon, 61; *Witt v. State*, 6 Cold. (Tenn.) 5; *Staup v. Com.*, 74 Pa. St. 458; *O'Mara v. Com.*, 75 Id. 424; *State v. Coffee*, 3 Yerg. 283; *Dove v. State*

3 Heisk. 348; *State v. Patterson*, 45 Vt. 308; *Patterson v. People*, 46 Barb. 626; *People v. Schryver*, 3 Hand. (42 N. Y.) 1; *People v. Stokes*, 53 N. Y. 164; *State v. Porter*, 34 Iowa, 131; *State v. Willis*, 63 N. C. 26; *State v. Haywood*, Phill. (N. C.) 376; *Maher v. People*, 10 Mich. 212; *Loeffner v. State*, 10 Ohio, 599; *Floyd v. State*, 3 Heisk. 342; *McDaniel v. State*, 8 S. & M. 401; *State v. Hildreth*, 8 Ired. 429; *Pierson v. State*, 12 Ala. 149; *State v. Holme*, 54 Mo. 153; *Com. v. York*, 9 Metc. 93; *U. S. v. Lawrence*, 4 Cranch C. C. 514; *Atty-Gen. v. Parnter*, 3 Brown C. C. 441; *U. S. v. McGlue*, 1 Curtis, 1; *State v. Spencer*, 1 Zabřiskie, 202; *State v. Brandon*, 8 Jones (N. C.) 463; *State v. Starke*, 1 Strobhart, 479; *State v. Brinyea*, 5 Ala. 244; *People v. Myers*, 20 Cal. 518; *Boswell v. Com.*, 20 Grattan, 860; *Com. v. Eddy*, 7 Gray, 583; *State v. Bertrandt*, 3 Oregon, 61; *Kriel v. Com.* 5 Bush (Ky.) 362; *Dixon v. State*, 13 Fla. 636; *U. S. v. Cornell*, 2 Mason, 91; *State v. Smith*, 2 Strobb. 77; *Com. v. Drew*, 4 Mass. 391; *Res. v. Bob*, 4 Dallas, 146; *Penn v. Honeyman*, Addison, 148; *Penn. v. McFall*, Id. 257; *Penn. v. Lewis*, Id. 282; *State v. Zeller*, 2 Halst. 220; *State v. Merrill*, 2 Dev. 269; *People v. McLeod*, 1 Hill's N. Y. R. 377; *State v. Town*, Wright, 75; *State v. Irwin*, 1 Hayw. 112; *State v. Peters*, 2 Rice's Dig. 106; *State v. Turner*, Wright, 20; *Woodsides v. State*, 2 Howard's Miss. R. 656; *Dexter v. Spear*, 4 Mason, 115; *Bivens v. State*, 6 Eng. (Ark.) 455; *Seaborn v. State*, 20 Ala. 15; *U. S. v. McGlue*, 1 Curtis Ct. Ct. 1; *People v. Clark*, 3 Selden, 385; *People v. Sullivan*, Id. 396; *People v. Kirby*, 2 Parker C. R. 28; *Kilpatrick v. Com.*, 7 Casey, 198; *Mitchum v. State*, 11 Ga. 615; *Bird v. State*, 14 Id. 43; *Green v. State*, 28 Miss. 687; *Price v. State*, 36 Id. 531; *U. S. v. Mingo*, 2 Curt. C. C. 1; *U. S. v. Armstrong*, Id. 446; *State v. Johnson*, 3 Jones Law (N. C.) 226; *Com. v. York*, 9 Metc. 93, *Wilde. J.*, diss.; *People v. Barry*, 31 Cal. 357; *Clem v. State*, 31 Ind. 480; *Bradley v. State*, Id. 492; *Holland v. State*, 12 Fla. 117; *McAdams v. State*, 25 Ark. 405; *Murphy v. People*, 37 Ill. 447; *State v. Hoyt*, 13 Minn. 132; *State v. Bertrand*, 3 Or. 61; *State v. Deeklotts*, 16 Iowa, 447; *State v. Shippey*, 10 Minn. 223; *Jeff v. State*, 39 Miss. 593; *Isaacs v. State*, 25 Tex. 174; *Clarke v. State*, 55 Ga. 75; *State v. Brown*, 12 Minn. 538; though see *Smith v. Com.* 1 Duvall (Ky.) 224; *Coffee v. State*, 3 Yerg. 283; *Dove v. State*, 3 Heisk. 348; *Hamby v. State*, 36 Tex. 342; *Barcus v. State*, 49 Miss. 17; *State v. Kieth*, 9 Nev. 15; *Gale v. People*, 26 Mich. 157; *O'Mara v. Com.*, 75 Penn. St. 424; *State v. Rash*, 12 Ired. 382; *Templeton v. State*, 27 Mich. 501; *State v. Green*, 35 Conn. 203; *State v. Langford*, Busbee, 436; *Stone v. State*, 4 Humph. 27; *McCann v. People*, 3 Parker C. R. 272; *State v. Watkins*,

9 Conn. 49; State v. Green, 35 Id. 203; Com. v. Smith, 7 Smith's Laws, Appen.; 2 Wheel. C. C. 80; Commonwealth v. McPike, 3 Cush. 181; Osborne v. People, 2 Parker, C. R. 583; People v. Robles, 34 Cal. 591; Mason v. State, 42 Ala. 543; Heath v. Com., 1 Rob. (Va.) 735; see State v. Rash, 12 Ired. 382; Johnson v. State, 17 Ala. 618; Walters v. People, 6 Parker C. R. 15; Bottomly v. U. S., 1 Story, 135; Dunn v. State, 2 Pike, 229; People v. Hopson, 1 Denio, 574; People v. Wood, 3 Parker C. R. (N. Y.) 681; State v. Raymond, 20 Iowa, 582; State v. Knapp, 45 N. H. 148; Keener v. The State, 18 Ga. 194; Pritchett v. State, 22 Ala. 39; Campbell v. People, 16 Ill. 17; Cornelius v. Commonwealth, 15 B. Monr. 539; Jewett v. Banning, 21 N. Y. 27; Lingo v. State, 29 Ga. 470; Hoyer v. State, 39 Id. 718; Pitman v. State, 22 Ark. 574; Campbell v. People, 16 Ill. 17; Pritchett v. State, 22 Ala. 39; Cornelius v. Com. 15 B. Monr. 539; Little v. State, cited Hor. & Thomp. Self-defense, 487; State v. Goodrich, 19 Vt. 116; Holler v. State, 37 Ind. 57; Scoggins v. People, 37 Cal. 677; State v. Sloane, 47 Mo. 604; State v. Hays, 23 Id. 287; State v. Keene, 50 Id. 359; Powell v. State, 19 Ala. 517; Newcomb v. State, 37 Miss. 383; State v. Jackson, 17 Mo. 544; People v. Henderson, 28 Cal. 465; People v. Lombard, 17 Id. 316; though see People v. Scroggins, 37 Id. 676; Atkins v. State, 16 Ark. 568; Pridgen v. State, 31 Tex. 420; State v. Gregor, 21 La. An. 473; State v. Leonard, 6 Id. 420; Myers v. State, 33 Tex. 525; State v. Mullen, 14 La. An. 577; Evans v. State, 44 Miss. 762; Hughey v. State, 47 Ala. 97; State v. Hays, 23 Mo. 287; Harris v. State, 47 Miss. 318; State v. Hall, 9 Nev. 58; Jim v. State, 5 Humph. 146; Commonwealth v. Burgess, 2 Va. Cases, 484; Commonwealth v. Smith, 7 Smith's Laws, 697; Republica v. Mulatto Bob, 4 Dallas, 146; Maxwell v. State, 3 Heisk. 420; State v. Rash, 12 Ired. 382; Johnson v. State, 17 Ala. 618; Archbold's C. P. 283; Heath v. Com., 1 Robin. (Va.) 735; State v. Wentworth, 37 N. H. 196; Dunn v. State, 2 Pike, 229; Hopkins v. Com., 14 Wright, 9; State v. Alford, 31 Conn. 40; Stephens v. People, 4 Parker C. R. 396; La Beau v. People, 34 N. Y. 223; Pitman v. State, 22 Ark. 354; Mimms v. State, 16 Ohio St. 221; see Moore v. State, 2 Id. 500; Cluck v. State, 40 Ind. 263; Hopkins v. Com., 50 Penn. St. 9; Dixon v. State, 13 Fla. 636; Nesbit v. State, 43 Ga. 238; Templeton v. People, 27 Mich. 501; People v. Winters, 29 Cal. 658; People v. Hendrickson, 1 Parker C. R. 406; Hanby v. State, 36 Tex. 523; Eggler v. State, 56 N. Y. 642; see also Wharton on Criminal Law, 7th ed. § 731-5; Burrill on Circumstantial Evidence, 1 Greenleaf on Evidence, § 53; 2 Russel on Crimes, 777.

## PART III.

## DOCUMENTS.

## CHAPTER I.

## DOCUMENTARY EVIDENCE IN GENERAL.

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**215.** The remaining instruments of evidence are documents, under which term are properly included all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, milkmen, &c. indicate, by notches, the number of loaves of bread or quarts of milk supplied to their customers; the old exchequer tallies, (*a*) and such like, are documents as much as the most elaborate deeds. In some instances, no doubt, the line of demarkation between documentary and real evidence seems faint; as in the case of models or drawings, which clearly belong to the latter head, but differ from that which we are now considering in this, that they are actual, not symbolical representations.

(*a*) These tallies were used as acquittances for debts due to the crown, and for some other purposes. A piece of wood, about two feet long, was cut into a particular uneven form, and scored with notches of different sizes, to denote different denominations of coin, the largest denoting thousands of pounds; after which came respectively hundreds, tens, and units of pounds; while shillings and pence were designated by still smaller notches. The wood was then split down the middle, into two parts, so that the cut passed through the notches. One portion was given out to the accountant, &c., which was called the "tally;" the other was kept by the chamberlain, and called the "counterfoil." The irregular form of the tally, together

with the natural inequalities in the grain of the wood, rendered fabrication extremely difficult. Tallies having been abolished, and receipts substituted by 23 Geo. 3, c. 82, and 4 & 5 Will. 4, c. 15, those in existence were destroyed as useless. A few, however, have been preserved in the remembrancer's office, with a view of which the author has been kindly favored. See further on the subject of these tallies, *Dialogus de Scaccario*, lib. 1, c. 5; *Madd. Hist. Exch.* chap. 23, § 28; *Gilb. Exch.* chap. 9. Tallies are in use in France, and recognized by law there. *Cod. Civil*, liv. 3, tit. 3, chap. 6, sect. 1, § 3, art. 1353; *Bonnie, Traité des Preuves*, §§ 614-616, an. 335.

**216.** Documents, being inanimate things, necessarily come to the cognizance of tribunals through the medium of human testimony; for which reason some old authors have denominated them dead proofs (*probatio mortua*), in contradistinction to witnesses, who are said to be living proofs (*probatio viva*). (*b*) When documents which are wanted for evidence are in the possession of the opposite party, a notice to produce them should be served on him in due time before the trial;<sup>1</sup> when, if he fails to produce them, derivative,

(*b*) Bract. lib. 5, fol. 400 b; Co. Litt. 6 b.

<sup>1</sup> The notice must be reasonable (*Dean v. Berder*, 15 Tex. 298; *United States v. Winchester*, 2 McLean, 135; *Farnsworth v. Sharp*, 5 Sneed (Tenn.) 615; *Potier v. Barclay*, 15 Ala. 439; *Gunter v. Fall*, 15 Cal. 63; *Bank of South Carolina v. Brown*, *Dudley* (Ga.) 62; *Jefferson v. Conaway*, 5 Harr. 16; *State v. Lockwood*, 5 Blackf. (Ind.) 145; *Kimble v. Joslin*, *Overt* (Tenn.) 380; *Carlard v. Cunningham*, 37 Pa. St. 288; *Anderson Bridge Co. v. Applegate*, 13 Ind. 339; *Patterson v. Linden*, 14 Iowa, 414; *Dukey v. Ashby*, 2 A. K. Marsh. (Ky.) 11; *Williams v. Benton*, 12 La. Ann. 91; *Kennedy v. Fowke*, 5 Har. & J. 63; *Robertson v. Parks*, 3 Md. Ch. 65; *Commonwealth v. Emery*, 2 Gray (Mass.) 80; *Browne v. Boston*, Id. 494; *Lewire v. Dille*, 17 Mo. 64; *Farmers, &c. Bank v. Loneragan*, 21 Id. 46; *Ford v. Manson*, 4 Johns. 220; *Week v. Lyon*, 18 Barb. 530. And consult, as to the rule as to various descriptions of documents and writings in the United States, *Alwell v. Grant*, 11 Md. 101; *Central Bank v. Allen*, 16 Me. 41; *Faubault v. Ely*, 2 Dev. (N. C.) L. 67; *Eagle Bank v. Chapin*, 3 Pick. 180; *Falkner v. Beers*, 3 Dougl. (Mich.) 117; *Cristy v. Horne*, 24 Mo. 242; *Leavitt v. Simes*, 3 N. H. 14; *Morrow v. Commonwealth*, 48 Pa. St. 305; *Rusk v. Sowerwine*, 3 Har. & J. (Md.) 97; *Blood v. Harrington*, 8 Pick. 552; *Harris v. Whitcomb*, 4 Gray (Mass.) 433; *Commonwealth v. Parker*, 2 Cush. 212; *Watkins v. Pintard*, 1 N. J. L. (Coxe) 378; *Waring v. Warren*, 1 Johns. 340; *Ledbetter v. Morris*, 1 Jones (N. C.) L. 545; *Murchison v. McLeod*, 2 Jones (N. C.) 239; *Dennis v. Barber*, 6 Serg. & R. 420; *Clifton v. United States*, 4 How. 242; *Thomas v. Harding*, 8 Me. 18 (Greenl.) 417; *Phillips v. Scott*, 43 Mo. 86; *Thalhimer v. Brinckerhoff*, 6 Cowen, 90; *King v. Lowery*, 20 Barb. 532; *Lambert v. Lambert*, 11 Ired

or, as it is technically termed, "secondary" evidence of their contents may be given.<sup>1</sup> (c) When they are

(c) Bk. 3, pt. 2, ch. 3.

L. 162; McCracken v. McCrary, 5 Jones (N. C.) L. 399; Beates v. Retallick, 23 Pa. St. 288; West Branch Ins. Co. v. Helfenstein, 40 Id. 298; Henderson v. State, 14 Tex. 503; Bonner v. Home Ins. Co., 13 Wis. 677; Bright v. Young, 15 Ala. 112; Rawley v. Doe, 7 Blackf. (Ind.) 143; Smith v. Reed, 7 Id. 242; Greenough v. Shelden, 9 Iowa, 503; McDowell v. Hall, 2 Bibb. (Ky.) 610; Bank of Kentucky v. McWilliams, 2 J. J. Marsh. (Ky.) 256; McQueen v. Sandel, 15 La. Ann. 140; Lowell v. Flint, 20 Me. 401; Thayer v. Middlesex Mutual Insurance Co., 10 Pick. (Mass.) 326; Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282; Loring v. Whittemore, 13 Gray (Mass.) 228; Cooper v. Granberry, 33 Miss. 117; Fraux v. Fraux, 2 N. J. L. (1 Penn.) 166; Jackson v. Livingston, 7 Wend. (N. Y.) 136; Sheldon v. Wood, 2 Bosw. (N. Y.) 267; Faribault v. Ely, 2 Dev. (N. C.) L. 67; Sally v. Geinter, 13 Rich. (S. C.) 72; Maxwell v. Light, 1 Call (Va.) 117; Goekell v. Morris, 7 Watts & S. 317; Muller v. Hoyt, 14 Tex. 49; Webster v. Clark, 30 N. H. (10 Foster) 245; Dennis v. Barber, 6 Serg. & R. 420; Reading R. R. Co. v. Johnson, 7 Watts & S. 317). If a writing be in court, no notice to produce it is necessary to let in parol

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<sup>1</sup> As to the rules regulating the admission of secondary evidence, see *Enders v. Sternberg*, 2 Abb. (N. Y.) App. Dec. 31; *Rice v. Davis*, 7 Lans. 363; *Hanson v. Eustace*, 2 How. (U. S.) 653. The protest of a note, authenticated by the signature and official seal of a notary, found among his papers after his death, is competent secondary evidence of his acts. (*Porter v. Judson*, 1 Gray (Mass.) 175). A mortgage made under a statute which recited the acceptance, which the draughtsman of the mortgage testified to copying from the corporate records, is sufficient evidence of acceptance by a corporation of certain acts of the legislature (*Sinking Fund Com'rs v. Northern Bank, &c.*, 1 Metc. (Ky.) 174). Parol evidence of contents of papers relating to facts collateral to the issue, is sufficient (*Mumford v. Bowne*, Anth. (N. Y.) 40). Proof that a person is generally reputed an officer, and is actually in the exercise of an office, will ordinarily be sufficient evidence of the fact (*Allen v. M'Neel*, 1 Mill (S. C.) Const. 459; *People v. Clingan*, 5 Cal. 389). Where there are degrees in secondary evidence, the best should be produced. A sworn copy of a written instrument will be

in the possession of a third party, he should be served with what is called a subpoena duces tecum, *i.e.*, a summons to attend the trial as witness and bring the evidence of its contents (*Dana v. Boyd*, 2 J. J. Marsh. 587); or where the writings are a proper matter of defense (*Kellar v. Savage*, 2 Me. 199); or if the party who would otherwise be notified offer to produce the papers, and fails to do so, without asking further time (*Dwinell v. Larrabee*, 38 Me. 464); or where the party is charged with their fraudulent possession (*Gray v. Kernahan*, 2 Mill. (S. C.) Const. 65; *Morgan v. Jones*, 24 Ga. 155; *State v. Mayberry*, 48 Me. 218, S. P.; *Rose v. Lewis*, 10 Mich. 483; *Hart v. Robinett*, 5 Mo. 11; *Meally v. Greenough*, 25 N. H. (5 Fost.) 325; *Hammond v. Hopping*, 13 Wend. 505; *Hardin v. Kretsinger*, 17 Johns. 293; *Edwards v. Bonneau*, 1 Sandf. (N. Y.) 610; *Forward v. Harris*, 30 Barb. 338; *Pickering v. Myers*, 2 Bailey (S. C.) 113; *Hamilton v. Rice*, 15 Tex. 382); nor in an action to recover the amount of a forged bank note (*Luckett v. Clark*, Litt. (Ky.) Select Cases, 178); nor if the document is hopelessly lost, or out of the possession of parties or the jurisdiction of the court (*McCreery v. Hood*, 5 Blackf. 116; *McCaulay v. Earnhart*, 1 Jones (N. C.) L. 502; and see *Bowman v. Welting*, 39 Ill. 416; *Mitchell v. Jacobs*, 17 Id. 236; *Shepherd v. Giddings*, 22 Conn. 282;

preferred to verbal testimony to prove its contents, unless the writing be impeached for fraud, duress, or other legal reason (*Williams v. Waters*, 36 Ga. 454). Where a vessel was insured, with a warranty that she should be furnished with a license from the British admiral in the usual form, evidence that a witness saw a license from the British admiral on board, that he had seen a number of them, and that this was in the usual form, is sufficient evidence that such a license was on board (*Bulkey v. Derby Fishing Co.*, 1 Conn. 572). So as to lost documents, it is competent to prove by the clerk of court the cause of action upon a judgment, record of which was destroyed by the burning of the court-house (*Jones v. Lewis*, 37 Miss. 434; and see *Pierce v. Bank of Tennessee*, 1 Swan. 263; *White v. Barney*, 27 Tex. 50; *Thomas v. Harding*, 8 Me. (8 Greenl.) 417; *Routh v. Agricultural Bank*, 20 Miss. (12 Smed. & M.) 161; *Davis v. Petit*, 11 Ark. 349; *Marshall v. Morris*, 16 Ga. 368). Secondary evidence of an order of by the proper court to sell attached goods, is admissible, when the original order cannot be found (*MacLaren v. Birdsong*, 24 Ga. 265), but the name of a lost paper cannot control dis-

documents with him. The person on whom such a subpoena has been served is bound to obey it, so far as attending the trial and bringing the documents (*Bright v. Pennywit*, 21 Ark. 130; *Pond v. Lockwood*, 8 Ala. 669).

The following peculiar or exceptional cases may be noticed:

In trover for a bond, notice to produce it at the trial is not necessary to enable the plaintiff to give parol evidence of its contents (*Hays v. Riddle*, 1 Sandf. (N. Y.) 248). A party is not bound to pay any attention to a verbal notice to produce a paper on the trial of a cause (*Cummings v. McKinney*, 5 Ill. (4 Scam.) 57). Notice given the day before a trial, to produce a paper in the possession of a person eighty miles distant, renders the introduction of secondary evidence proper (*Cody v. Hough*, 20 Ill. 43). Where a party notified to produce a receipt lives within fifty yards of the court-house, and asks until the next day, parol evidence of the contents of the receipt may be admitted (*Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121). Notice to produce a book of account given on the evening previous, sufficient, where the counting-house of the party was near the court-house (*Shreve v. Dulany*, 1 Cranch C. Ct. 499). Notice to a party, several days before a trial time, to produce a writing, is sufficient to admit parol evidence of its contents,

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tinct proof of its contents (*Bell v. McCawley*, 29 Ga. 355). Parol proof of the contents of a lost deed must be so clear and positive as to leave no reasonable doubt of the substance of the parts material to its effect (*Bennett v. Walker*, 23 Ill. 97); but it will be sufficient if intelligent witnesses who have read the paper understand its object, and can state it with precision (*Posten v. Rasette*, 5 Cal. 467); but if a party has voluntarily destroyed a written instrument, he cannot prove its contents by secondary evidence unless he repels inference of a fraudulent design in its destruction (*Blake v. Flash*, 44 Ill. 302; *Joannes v. Bennett*, 5 Allen (Mass.) 169). In *Hooper v. Chism* (13 Ark. 496), it was held that where a bill of sale of warranty is alleged to be lost, and its contents, as alleged, are denied by the answer, they should be substantially proven, when no copy is produced, by a witness who has seen or read the instrument, or is otherwise enabled to speak with some degree of accuracy as to its contents, and identify it as the one executed by the party to be charged. Proof of the contents of a lost paper should be the best the party has in his power to produce (*Renner v. Bank of Columbia*, 9 Wheat. 581). The

with him ; but, by analogy to the principles already explained, (*d*) he will not be compelled to produce them, if the disclosure might subject him to crimina-

(*d*) *Supra*, pt. I, ch. I.

even though the plaintiff resides out of the state (*Jefford v. Ringgold*, 6 Ala. 544). Papers are not made evidence by a notice calling upon the other party to produce them, but the party requesting them may waive reading them (*Blight v. Ashley*, Pet. 15). A notice given at the bar during the progress of a trial, to produce a paper, is not sufficient, unless the paper is in court at the time, and in possession of the party upon whom demand is made, or where easy of access (*Atwell Miller*, 6 Md. 10; *Board of Justices v. Fennimore*, 1 N. J. L. (Coxe) 242; *M'Pherson v. Rathbone*, 7 Wend. (N. Y.) 216), but notice given after the commencement of a circuit, and four days previous to the trial, where plaintiff's residence is within twelve miles of the place of trial, is sufficient (*Hammond v. Hopping*, 13 Wend. (N. Y.) 505; but see *Durkee v. Leland*, 4 Vt. 612; *Hastings v. Power*, 1 Tyler (Vt.) 272; *S. P., Barker v. Barker*, 14 Wis. 131; *Bartin v. Kane*, 17 Id. 37).

best evidence of the contents of a lost instrument is a sworn copy of the original (*Evans v. Bolling*, 8 Port. (Ala.) 546). The contents of letters which are lost may be shown by any one, without accounting for the non-production of the person to whom they were written (*Drish v. Davenport*, 2 Stew. (Ala.) 226). Where there is no subscribing witness to a lost deed, its contents may be proved by any one who has read it, and knows what it contains (*Nolen v. Gwyn*, 16 Ala. 725; *Fralick v. Presley*, 39 Id. 457; and see further *Coman v. State*, 4 Blackf. (Ind.) 251; *Higgins v. Reed*, 8 Iowa, 298; *Bradbury v. Dwight*, 3 Metc. (Mass.) 31; *Whitney v. Sprague*, 23 Pick. 198; *Thayer v. Barney*, 12 Minn. 502; *Livingston v. Rogers*, 1 Caine's Cas. 27; 2 Johns. Cas. 488; *Jackson v. Vail*, 7 Wend. 125; *Sizer v. Burt*, 4 Den. 426; *Moffat v. Moffat*, 10 Bosw. (N. Y.) 468; *Halsey v. Blood*, 29 Pa. St. 319; *Williams v. Metter*, 1 Wash. Ter. 105; *Hill v. Parker*, 5 Rich. (S. C.) 87; *Arthur v. Gayle*, 38 Ala. 259; *Jordan v. Fenno*, 13 Ark. 593; *Kelsey v. Hammer*, 18 Conn. 311; *Coffeen v. Hammond*, 3 Iowa, 241; *Hawkins v. Craig*, 1 B. Monr. (Ky.) 27; *Scammon v. Scammon*, 33 N. H. 52; *Hamilton v. Van Swearingen*, Add. (Pa.) 48; *Mayson v. Beazley*, 27 Miss. 106; *Darby v. Garrick*, 2 Rich. (S. C.) 532; *Pierce v. Bank of Tennessee*, 1 Swan. (Tenn.) 265; *White v. Barney*, 27 Tex. 50).

tion, penalty, or forfeiture. So a party will not be required to produce the muniments of title to his estate, (e) nor will his attorney to whose care they

(e) *Tayl. Ev.* §§ 428, 1318, 4th ed.

Where plaintiff gives notice to the defendant to produce an original contract, and affixed to the notice a copy thereof, which was not an exact copy, but indicated with sufficient certainty what was meant, the notice is sufficient (*Bogart v. Brown*, 5 *Pick. (Mass.)* 18; *Bemis v. Charles*, 1 *Metc. (Mass.)* 440). A deed produced by a party at a trial, pursuant to a notice to him from the opposite party, is, *prima facie*, to be taken to be duly executed, and may be read in evidence, without proof of its execution (*Betts v. Badger*, 12 *Johns. (N. Y.)* 223; *Jackson v. Kingsley*, 17 *Id.* 157; but see *Hylton v. Brown*, 1 *Wash.* 343). A paper produced on notice, must be proved by him who offers it, in like manner as if he had himself produced it, unless the party producing it be a party to the instrument, or claim a beneficial interest under it (*Rhodes v. Selin*, 4 *Wash.* 715). Where a party in possession of a paper is served with notice to produce it, such paper is not evidence for him until it is delivered to the other party for inspection, after which it is evidence for the party producing it, if not used by the party calling for it (*Ib.*). When notice is served by one party to a suit upon the other, to produce a certain paper, and the party produces a paper not answering in all particulars the one described in the notice, and states at the same time that it is the only paper in his possession of the kind called for, the statement is not evidence for the jury (*Anderson v. Root*, 16 *Miss. (8 Smed. & M.)* 362). When under notice to produce a deed, a party produces a copy and claims under it, no proof of its correctness or of the execution of the original is necessary as against him (*Herring v. Rogers*, 30 *Ga.* 615). A notice to produce papers on a trial to be had this day, is a notice to produce them on a trial at a subsequent term (*State v. Kimborough*, 2 *Dev. (N. C.)* L. 431; *Jackson v. Shearman*, 6 *Johns.* 19). But it is not necessary to give notice to produce an award, in possession of the opposite party, before offering evidence as to it (*Scott v. Baker*, 37 *Pa. St.* 330; and see *Dana v. Conant*, 30 *Vt.* 246; *Gilmore v. Wale*, *Anth. (N. Y.)* 64; *Patten v. Goldsborough*, 9 *Serg. & R. (Pa.)* 47; *Den v. M'Allister*, 7 *N. J. L. (2 Hals.)* 46; *Divers v. Foulton*, 8 *Gill & J. (Md.)* 202; *Walden v. Davison*, 12 *Wend.* 65; *Cross v. Bell*, 34 *N. H.* 83; *Eastman v. Amoskeag, &c. Co.*

have been entrusted; (*f*) and in either case independent secondary evidence of their contents may be given. (*g*) The admissibility of documents in evidence, as well as all preliminary questions of fact on which that admissibility depends, (*h*) and their legal construction when received, are to be decided by the judge; other questions respecting them are for the jury.

217. Although documentary evidence most usually presents itself in a written form, the terms "Writing" and "Written evidence" have obtained in law a secondary and limited signification, in which they are commonly, but not always used: and much confusion has arisen from the ambiguous meanings of these terms. This matter cannot be more clearly explained, than in the following passage from one of the most eminent of the French jurists: "The force of written proofs consists in this, that men have agreed together to preserve by writing the recollection of things past, and of which they were desirous to establish the remembrance, either as rules for their guidance, or to

(*f*) *Hibbert v. Knight*, 2 Exch. 11; (*g*) *Per Hill, J., R. v. Leatham*, 3 Doe *d.* *Gilbert v. Ross*, 7 M. & W. E. & E. 658, 668; and see *infra*, bk. 102; *Ditcher v. Kenrick*, 1 Car. & P. 3, pt. 2, ch. 3. 161; *Volant v. Soyer*, 13 C. B. 231. (*h*) Bk. 1, pt. 1, § 82, and note (r).

44 N. H. 143; *Jackson v. Shearman*, 6 Johns. 19; *Jackson v. Newton*, 14 Id. 335; *Sedgwick v. Waterman*, 2 Root, 434; *Merwin v. Ward*, 15 Conn. 377; *Bell v. Chandler*, 23 Ga. 356; *Rector v. Rector*, 8 Ill. (3 Gilm.) 105; *Shortz v. Unangst*, 3 Watts & S. 45; *Stover v. Ellis*, 6 Ind. 152; *Madison, &c. R. R. Co. v. Whitesel*, 11 Id. 55; *Norton v. Keywood*, 20 Me. 395; *Life & Fire Ins. Co. v. Mechanics Ins. Co.*, 7 Wend. 31; *Hanson v. Eustace*, 2 How. U. S. 653; *Jewell v. Center*, 25 Ala. 498; *Hunt v. Collins*, 4 Iowa, 56; *Spring Garden Mutual Ins. Co. v. Evans*, 9 Md. 1; *Newson v. Davis*, 20 Tex. 419; *Chaffee v. Cox*, 1 Hilt. (N. Y.) 78; *Reddington v. Gilman*, 1 Bosw. 235; *Barber v. Lyon*, 22 Barb. 622; *Reid v. Colock*, 1 Nott. & Mc. (S. C.) 592; *Tillery v. Simmons*, 1 Overt. (Tenn.) 209).



have therein a lasting proof of the truth of what they write. Thus, agreements are written to preserve the remembrance of what the contracting parties have prescribed for themselves, and erect that which has been agreed on into a fixed and immutable law for them. So wills are written, to establish the recollection of what a person who had the right to dispose of his property has ordained, and make thereof a rule for his heir and legatees. In like manner are written sentences, decrees, edicts, ordinances, and everything intended to have the effect of title, or of law, &c. . . . The writing preserves unchangeably what is entrusted to it, and expresses the intention of the parties by their own testimony." (i) Now it is to such documents as are here spoken of, that the terms "writing" and "written evidence" are commonly applied in our books. (k) The civilians and canonists appear to have included all such under the general name of "Instruments;" (l) but among us this term

(i) Domat, Lois Civiles. pt. 1, liv. 3, tit. 6, sect. 2. See the original, *supra*, Introd. pt. 2, § 60. So deeds usually run, "Now this indenture witnesseth, &c.;" and conclude, "In witness whereof, &c.;" and agreements commonly say, "It is hereby agreed, &c."

(k) The word "writing," as well as the Norman French "escript," have been used in this sense from the earliest times. See Litt. sect. 365; Co. Litt. 352 a; 5 Co. 26 a. So in 2 Edw. IV. 3, A. & B. Nota q Littleton voile aver pled escript per voy de fait, et voile aver appel' ceo un fait, come adire, fist un fait de feoffment. Et Choke dit, q c ne poet estre, car il n'est dit un fait, sinon q un livre de cest ust estre fait, p q Litt. luy agree a ceo, et dit que il serr appel un writing,

et le appel' un escript conteigne q tiel home enfeoffe tiel home."

(l) "Facilioris probationis causa etiam conficiuntur instrumenta. Quo vocabulo quamvis omnia, quibus causa instruitur, adeoque et testes denotentur: hic tamen instrumentum est scriptura, ad rerum gestarum memoriam fidemque confecta. Quia autem vel publica fide nititur illa scriptura, vel privata: hinc et instrumentum est vel publicum, vel privatum. Itaque publica habentur instrumenta, confecta à magistratibus, veluti acta publica, tabulæ censuales, apochæ publicæ, in monimenta publica translata, diplomata, et notitiæ, ex archivo publico depromptæ, &c." Heinec. ad Pand. pars 4, §§ 126 and 127. See also Devotus, Inst. Canon. lib. 3, tit. 9 § 20.

is not usually applied to public writings. It is not, however, essential to an instrument that it be the act of two or more parties; it may be unilateral as well as synallagmatic. Thus, a deed poll, or a will is an "instrument," as much as the most complicated indenture consisting of any conceivable number of parts. (*m*)

218. "Writings" understood in this sense are of two kinds, "Public" and "Private." (*n*) Under the former come acts of parliament, judgments and acts of courts, both of voluntary and contentious jurisdiction, proclamations, public books, and the like. They are divided into "Judicial" and "Not Judicial;" and also into "Writings of record" and "Writings not of record." (*o*) Records, says Lord Chief Baron Gilbert, "are the memorials of the legislature, and of the king's courts of justice, and are authentic beyond all manner of contradiction;" (*p*) they are said to be "monumenta veritatis, et vetustatis vestigia," (*q*) as also "the treasure of the king." (*r*) But the judgments of tribunals, are not in general receivable in evidence against those who were neither party nor privy to them; although, in some instances, the law, from motives of policy, renders them conclusive and binding on all the world, as in the case of judgments in rem.

(*m*) ("Nec minus ex his definitionibus intelligitur, instrumentis privatis accensenda esse—1. Chirographa, quæ super negotio *μονοπλέυρω*, conficiuntur. 2. Syngraphas, super negoti *διπλέυρω*, scriptas. 3. Apochas, quibus sibi solum fatentur creditores. 4. Antapochas (Reverales), quibus debitor se solvisse, et ad hanc præstationem obstrictum esse fatetur. 5. Epistolas. 6. Libros rationum, et 7. Quascumque alias scripturas privato-

rum." Heinec. ad Pand. pars 4, § 128.

(*n*) *Supra*, note (l); 2 Ph. Ev. 1, 10th ed.

(*o*) 2 Ph. Ev. 1, 10th ed.

(*p*) Gilb. Ev. 7, 4th ed. See also Plowd. 491; Co. Litt. 260 a; 4 Co. 71 a; Finch, Law, 231; 1 East, 355; 2 B. & Ad. 367.

(*q*) Co. Litt. 118 a · 293 b. See 2 Rol. 296.

(*r*) 11 Edw. IV. 1.

(s) Among public documents of a judicial nature but not of record, may be mentioned various forms of inquisitions, depositions, examinations, writs, pleadings &c.; and among those of a public nature not judicial the journals of the Houses of Parliament, the books of the bank of England, registers of births, marriages, and deaths, corporation books, books of heralds' visitations, books of deans and chapters, &c.

219. The principle of the admissibility of public writings in general, is thus clearly explained in a text work: "Documents of a public nature, and of public authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the parties on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents, is founded principally upon the circumstance, that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into, and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials, are in fact the agents of all the individuals who compose the public; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite that they should be confirmed and sanctioned by the ordinary tests of truth; in addition

to this, it would not only be difficult, but often utterly impossible, to prove facts of a public nature by means of actual witnesses examined upon oath." (t)<sup>1</sup> This

(t) Stark. Evid. 272-3, 4th ed. See Pand. pars 4, §§ 127 and 129; and Acc. Merrick v. Wakley, 8 A. & E. Devotus, Inst. Canon. lib, 3, tit. 9 170; Doe d. France v. Andrews, 15 § 20.  
Q. B. 759, per Erle, J.; Heinec. ad

<sup>1</sup> It is the duty of courts to know, judicially, the general course of human transactions, and of the ordinary meaning and nature of things (Boullemet v. State, 28 Ala. 83). Of the signification of abbreviations, such as "admr" for administrator (Moseley v. Martin, 37 Ala. 216). And see an interesting statement as to what courts are presumed to know, in Morgan's Law of Literature, vol. 1, p. 172; Weaver v. McEthenon, 13 Mo. 89; Stephen v. State, 11 Ga. 225; Ellis v. Park, 8 Tex. 205; Russel v. Martin, 15 Tex. 238; Lougher v. Kennedy, 2 Bibb. (Ky.) 607; Lampton v. Haggard, 3 T. B. Mon. 149; Jones v. Overstreet, 4 Id. 547; Bell v. Barnett, 2 J. J. Marsh. 516; Seymour v. Marvin, 11 Barb. 80; Kermott v. Ayer, 11 Mich. 181. Courts judicially know whatever ought to be generally known within their jurisdiction, as, for example, the peculiar nature of lotteries and the mode in which they are generally carried on (Boullemet v. State, 28 Ala. 83). The regular course of nature, in regard to the revolution of the seasons, and in relation to vegetables and animals (Patterson v. McCausland, 3 Bland (Md.) 69). Of facts of unvarying occurrence, but not of the vicissitudes of climate or the seasons (Dixon v. Nichols, 39 Ill. 372). Where it is evident from the time of their ancestor's death that his children arrived at full age before suit commenced, the court will take notice of the fact judicially (Floyd v. Johnson, 2 Litt. (Ky.) 109; Floyd v. Ricks, 14 Ark. 286). But not of what are the usual commissions on acceptances (Seymour v. Marvin, 11 Barb. (N. Y.) 80). The value of Canada currency, and the rate of Canadian interest are not judicially known by courts within the United States (Kermott v. Ayer, 11 Mich. 181; but see Lampton v. Haggard, 3 T. B. Mon. 149; Jones v. Overstreet, 4 Id. 547). Courts will take judicial notice of prominent geographical facts and features of the country (Mossman v. Forrest, 27 Id. 233). Of the commercial usage to observe fasts and festivals, without proof on the subject (Sasscer v. Farmer's Bank, 4 Md. 409). Courts cannot judicially say that the concentric layers in the trunk of a tree mark each a year's growth of the tree, and thus indicate its

must not be understood to mean, that the contents of public writings are admissible in evidence for every purpose :—each public document is only receivable in age by the number of concentric layers, though, if the fact were proved that the number of layers in a tree marks the number of years of the age of the tree, and that trees increase by an annual addition of one such layer, then the age of other similar trees might be proved in the same way (*Patterson v. McCausland*, 3 Bland (Md.) 69). Courts will take judicial notice of historical facts (*Payne v. Treadwell*, 16 Cal. 220; *Ferdinand v. State*, 29 Ala. 706). But on April 16, 1861, the supreme court of Texas could not take judicial notice, from a newspaper report, that Fort Sumpter had been fired on—that a civil war existed between two portions of the United States (*Bishop v. Jones*, 28 Tex. 294). The judicial notice has been held to extend to the situation of a town in a foreign country, and to the fact of a bar at the mouth of a river which vessels of a certain draft cannot cross (*The Peterhoff*, Blatchf. Prize Cas. 463). To the navigability of streams (*Neaderhouser v. State*, 28 Ind. 257). To the geographical position of towns in a county (*Indianapolis, &c. R. R. Co. v. Stephens*, 28 Ind. 429; *State v. Tootle*, 2 Harr. (Del.) 541; but see *Richardson v. Williams*, 2 Port. (Ala.) 339). To the government surveys and legal subdivisions of the public lands (*Atwater v. Schenck*, 9 Wis. 160; *Hill v. Bacon*, 43 Ill. 477; *Mossman v. Forrest*, 27 Ind. 238; *Prieger v. Exchange, &c. Ins. Co.*, 6 Wis. 89). To the area of a county (*Board of Commissioners, &c. v. Spitler*, 13 Ind. 235; *Buckinghouse v. Gregg*, 19 Ind. 401; *Wright v. Hawkins*, 28 Tex. 452; but see *Whitney v. Gauche*, 11 La. Ann. 432; *Goodwin v. Appleton*, 22 Me. 433; *Harding v. Strong*, 42 Ill. 148; *Cash v. Auditor of Clark Co.*, 7 Ind. 227; *Gilbert v. Molnie, &c. Co.*, 19 Iowa, 319; *Thomas v. Stigers*, 480; *Goodwin v. Appleton*, 22 Me. 453; *State v. Powers*, 25 Conn. 48; *Riggin v. Collier*, 6 Mo. 568; *Whitlock v. Castro*, 22 Tex. 108; *Woodward v. Chicago, &c. R. R. Co.*, 21 Wis. 309; *People v. Robinson*, 17 Cal. 363; *Indianapolis, &c. R. R. Co. v. Case*, 15 Ind. 42; *Edwards v. Davis*, 3 Tex. 321; *City Council of Montgomery v. M. & W. Plank Road Co.*, 31 Ala. 76; *Price v. Page*, 24 Mo. 65; *La Grange v. Chapman*, 11 Mich. 499; *Johnson v. Common Council*, 16 Ind. 227; *Wright v. Phillips*, 2 Greene (Iowa) 191; *Stanberry v. Nelson*, *Wright* (Ohio) 766; *Martin v. Martin*, 51 Me. 366; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *City Council, &c. v. Plank Road Co.*, 31 Ala. 76; *Pedicaris v. Tren*

proof of those matters, the remembrance of which it was called into existence to perpetuate. Some public writings are like records—conclusive on all the world; *ton &c. Co.*, 29 N. J. L. (5 Dutch.) 367; *Carron v. Washington Toll Bridge Co.*, *Phill. (N. C.) L.* 118; *Drake v. Flewellen*, 32 Ala. 106; *Danville, &c. Co. v. State*, 16 Ind. 456; *Illinois, &c. R. R. Co. v. Johnson*, 40 Ill. 33; *Burdini v. Grand Lodge of Alabama*, 37 Ala. 478; 1 Ala. Select Cases, 385.

The courts of the United States do not take judicial notice of alien laws. One asserting such a law must allege and prove the law as matter of fact (*Hooper v. Moore*, 5 Jones (N. C.) L. 130; *Peck v. Hibbard*, 26 Vt. 698; *Woodrow v. O'Connor*, 28 Vt. 776; *Bean v. Briggs*, 4 Iowa, 464; *Cheemasero v. Gilbert*, 24 Ill. 293; *Syme v. Stewart*, 17 La. Ann. 73; *Pecquet v. Pecquet*, Id. 204; *Frith v. Sprague*, 14 Mass. 455; *Palfrey v. Portland, &c. R. R. Co.*, 4 Allen (Mass.) 55; *Baptiste v. De Volunbrun*, 5 Har. & J. (Md.) 86; *Chouteau v. Pierre*, 9 Mo. 3; *Ocean Ins. Co. v. Field*, 2 Story, 63; *Doe v. Enslava*, 11 Ala. 1028; *United States v. Turner*, 11 How. 663; *Same v. Philadelphia & New Orleans*, Id. 654; *Choteau v. Pierre*, 9 Mo. 3; *Olt v. Soulard*, 9 Mo. 581; *Jewell v. Centre*, 25 Ala. 495; *Bradford v. Cooper*, 1 La. Ann. 325; *Owen v. Boyle*, 15 Me. 147; *Campion v. Kille*, 15 N. J. Eq. (2 McCart.) 476; *Cooke v. Crawford*, 1 Tex. 9; *Ludlow v. Van Rensaellaer*, 1 Johns. 94). As to judicial cognizance of the laws of other states, private laws, &c., see *Taylor v. Runyan*, 9 Iowa, 522; *Drake v. Glover*, 30 Ala. 382; *Billingsley v. Dean*, 11 Ind. 331; *Anderson v. Anderson*, 23 Tex. 639; *Faulk v. Faulk*, Id. 653; *Carey v. Cincinnati, &c. R. R. Co.*, 5 Iowa, 357; *Brimhall v. Van Campen*, 8 Minn. 13; *Whitesides v. Poole*, 9 Rich. (S. C.) 68; *Taylor v. Boardman*, 25 Vt. 581; *Holman v. Collins*, 1 Ind. 24; *Jones v. Laney*, 2 Tex. 342; *Newton v. Cocke*, 10 Ark. 169; *Territt v. Woodruff*, 19 Vt. 182; *Miller v. Avery*, 2 Barb. (N. Y.) Ch. 582; *Anderson v. Folger*, 11 La. Ann. 289; *Beauchamp v. Ludd*, *Hard. (Ky.)* 163; *Hosford v. Nichols*, 1 Paige (N. Y.) 220; *Irwin v. McLean*, 4 Blackf. (Ind.) 52; *Cook v. Wilson*, *Litt. (Ky.) Sel. Cas.* 437; *Mason v. Wash*, 1 Ill. (Breese) 16; *Ripple v. Ripple*, 1 Rawle (Pa.) 386; *Stephenson v. Bannister*, 3 Bibb. (Ky.) 363; *Davis v. Curry*, 2 Id. 238; *Sims v. Southern Ex. Co.*, 38 Ga. 129; *Hoyt v. McNeil*, 13 Minn. 390; *Rape v. Heaton*, 9 Wis. 328; *Hawthorne v. Hoboken*, 32 N. J. L. 172; *Levy v. State*, 6 Ind. 281; *Bevens v. Baxter*, 23 Ark. 387; *Carson v. Smith*, 5 Minn. 78; *Hammond*

but this is not their general character ; as, most usually, they only hold good until disproved.

220. Among private writings, the first and most v. Inloes, 4 Md. 138 ; Griswold v. Gallop, 22 Conn. 208 ; Lincoln v. Ballette, 4 Wend. 475 ; State v. Jarrett, 17 Md. 309 ; State v. O'Connor, 13 La. Ann. 486 ; Canal Co. v. R. R. Co., 4 Gill & J. (Md.) 1 ; State v. Bailey, 16 Ind. 46 ; Bertiner v. Waterloo, 14 Wis. 378 ; State v. Edwards, 19 Mo. 674 ; Cash v. State, 10 Humph. 111 ; Brucker v. State, 19 Wis. 539 ; State v. Minnick, 15 Iowa, 123 ; Taylor v. Rennie, 35 Barb. 272 ; York, &c. R. R. Co. v. Winans, 17 How. (U. S.) 30 ; Hizer v. State, 12 Ind. 330 ; State v. Williams, 5 Wis. 308 ; Beach v. Workman, 20 N. H. 379 ; Norell v. McHenry, 1 Mich. 227 ; Pearson v. Barrington, 32 Ala. 227 ; Shropshire v. State, 12 Ark. 190 ; Thompson v. Haskell, 21 Ill. 215 ; Alexander v. Burnham, 18 Wis. 199 ; Ingraham v. State, 27 Ala. 17 ; Raglan v. Wynn, 37 Ala. 32 : 1 Ala. Select Cases, 270 ; Land v. Patteson, Minor (Ala.) 14 ; State Bank v. Curran, 10 Ark. 142 ; Ward v. Henry, 19 Wis. 76 ; Broughton v. Blackman, 1 N. Chip. (Vt.) 109 ; Dyer v. Flint, 21 Ill. 80 ; Fancher v. De Montegro, 1 Head (Tenn.) 40 ; Scott v. Jackson, 12 La. Ann. 640 ; Wetherbee v. Dunn, 32 Cal. 106 ; Templeton v. Morgan, 16 La. Ann. 438 ; Burnett v. Henderson, 21 Tex. 588 ; Fellows v. Menasha, 11 Wis. 558 ; Danville, &c. Co. v. State, 16 Ind. 456 ; Russel v. Branahan, 8 Blackf. 277 ; Laufec v. Mestier, 18 La. Ann. 497 ; Taylor v. Graham, Id. 656 ; New Orleans Canal Co. v. Templeton, 20 Id. 141 ; Chapman v. Harrold, 55 Pa. St. 106 ; Durham v. Daniels, 2 Greene, (Iowa) 518 ; State v. McAllister, 24 Me. 139 ; Jones v. Fales, 4 Mass. 245 ; State v. Snowdon, 1 Brews. (Pa.) 218 ; McKinney v. O Connor, 26 Tex. 5 ; Jarvis v. Robinson, 21 Wis. 523 ; Lindsay v. Williams, 17 Ala. 229 ; State v. Hammett, 7 Ark. 492 ; Morgan v. State, 12 Ind. 448 ; Gilland v. Sellers, 2 Ohio St. 223 ; Pugh v. State, 2 Head, (Tenn.) 227 ; Buckinghouse v. Gregg, 19 Ind. 401 ; Williams v. Hubbard, 1 Mich. 446 ; Baker v. Mygatt, 14 Iowa, 131 ; State v. Postlewait, Id. 446 ; State v. Schilling, Id. 455 ; March v. Commonwealth, 12 B. Mon. (Ky.) 25 ; Minor v. Stone, 1 La. Ann. 283 ; Pagett v. Curtis, 15 Id. 451 ; Masterson v. Le Claire, 4 Minn. 163 ; Dozier v. Joyce, 8 Port. (Ala.) 303 ; Tucker v. State, 11 Md. 322 ; Exp. Patterson, 33 Ala. 74 ; Kilpatrick v. Commonwealth, 31 Pa. St. 198 ; Centee v. Pratt, 9 Md. 67 ; Cherry v. Baker, 17 Id. 75 ; Scott v. Scott, Id. 78 ; Chambers v. People, 5 Ill. (4 Scam.) 351 ; Graham v. Anderson, 42 Ill. 514 ; De

important are those which come under the description of "deeds," *i. e.* "writings sealed and delivered." (*u*) And they differ from inferior written instruments in this important particular, *viz.*, that they are presumed to have been made on good consideration; and this presumption cannot be rebutted, (*x*) unless the instrument is impeached for fraud; (*y*) whereas in contracts not under seal a consideration must be alleged and proved. (*z*)<sup>1</sup> In former ages deeds were rarely signed, and the essence of that kind of instrument consisted, and indeed consists still, in the sealing and delivery.

"Re, verbis, scripto, consensu, traditione,  
Junctura, vestes sumere pacta solent,"

has been the rule from the earliest times. (*a*) "No deed, charter, or writing, can have the force of a deed

(*u*) 2 Blackst. Comm. 295; Co. Litt. 171 b; Finch, L. 108.

(*x*) Plowd. 309; 3 Stark. Ev. 930, 3rd ed.; Id. 747, 4th ed.

(*y*) Id.

(*z*) Rann v. Hughes, 7 T. R. 350 (n).

(*a*) Bracton, lib. 2, c. 5, fol. 16 b; Plowd. 161 b; Co. Litt. 36 a.

Sobry v. De Laistre, 2 Har. & J. (Md.) 191; Manaun v. Webster, 7 Gill (Md.) 78; McGinnis v. State, 24 Ind. 500; Buford v. Hickman, 1 Hempst. 232; Alderson v. Bell, 9 Cal. 315; Lake Merced Water Co. v. Cowles, 31 Cal. 215; Vassault v. Seitz, 31 Cal. 225; People v. De La Guerra, 24 Id. 73; Symmes v. Major, 21 Ind. 443; Clark v. Pratt, 20 Ala. 470; Mobile, &c. R. R. v. Whitney, 39 Ala. 468; Herschfeld v. Devel, 12 Ga. 582; Butcher v. Brownsville, 2 Kan. 70; Nemnio v. Davis, 7 Tex. 26; Allegheny v. Nelson, 25 Pa. St. 332; Legrand v. Sidney College, 5 Munf. (Va.) 324; Collier v. Baptist Soc., 8 B. Mon. (Ky.) 68; Somerville v. Winbish, 7 Gratt. (Va.) 205; Grob v. Cushman, 45 Ill. 119; Coleman v. Dobbins, 8 Ind. 156; Judah v. Trustees, 16 Ind. 56; People v. Mahaney, 13 Mich. 481; Hensley v. Tarpey, 7 Cal. 288; Palmer v. Aldridge, 16 Barb. (N. Y.) 131; Papin v. Ryan, 32 Mo. 21; Flanigen v. Washington Ins. Co., 7 Pa. St. 306; Graves v. Keaton, 3 Cold. (Tenn.) 8; Wright v. Hawkins, 28 Tex. 452; Baylys v. Chubb, 16 Gratt. (Va.) 284.

<sup>1</sup> See Morgan's Addison on Contracts, vol. 1, p. 18, et seq and cases cited.



without a seal;" (*b*) and "traditio loqui facit chartam." (*c*) Deeds are usually attested by witnesses; who subscribe their names, to signify that the deed has been executed in their presence. (*d*) Anciently the number of witnesses was greater than at the present day; and when the execution of a deed was put in issue, process was issued against the witnesses whose names appeared on the instrument, who, on their appearance in court, seem to have discharged in some respects the functions of a jury. (*e*) If they were all dead it was tried by a jury—"Super fidem chartarum, mortuis, testibus, erit ad patriam de necessitate recurrendum." (*f*) In modern practice the rule was, that the execution of a deed must be proved by the testimony of at least one of the attesting witnesses. (*g*) If they were all dead, or insane, or out of the jurisdiction of the court, or could not be found on diligent inquiry, proof might be given of their handwriting; (*h*) but the testimony of third parties, even though they might have been present at the execution of the instrument, was not receivable to prove it. They might, however, be received to contradict the testimony of the subscribing witnesses; (*i*) although formerly this was doubted. (*k*) And so far was this principle carried, that even proof of an admission by a party, of the execution of a deed, would not in general dispense

(*b*) 3 Inst. 169.

(*c*) 5 Co. 1 a; Lofft, Max. 159, 188.

(*d*) 2 Blackst. Comm. 307.

(*e*) 2 Blackst. Comm. 307, 308; Co. Litt. 6 b

(*f*) Co. Litt. 6 b.

(*g*) *Infra*, bk. 4, pt. 2, ch. 7.

(*h*) See the cases collected, Stark.

Ev. 512-521, 4th ed., and 2 Phill. Ev. 254 et seq., 10th ed.

(*i*) *Blurton v. Toon*, Holt, 290; *Hudson's Case*, Skin. 79; *Lowe v. Jolliffe*, 1 W. Bl. 365; *Pike v. Badmering*, cited 2 Str. 1096; *Jackson v. Thomason*, 1 B. & S. 745.

(*k*) Per Alderson, B., in *Whyman* :<sup>4</sup> Garth, 8 Exch. 803.

with proof by the attesting witness. (*l*) But it was not necessary to call the attesting witness, or indeed to give any other proof of a deed thirty years old or upwards, and coming from an unsuspected repository; (*m*) unless perhaps when there was an erasure or other blemish in some material part of it. (*n*)<sup>1</sup>

**221.** Instruments not under seal are sometimes attested by witnesses; and in such cases it was held that the attesting witness must be called, or his hand-

(*l*) *Infra*, bk. 3, pt. 2, ch. 7.

(*n*) *Id.* 247.

(*m*) 2 Phill. Ev. 245-6, 10th ed.

<sup>1</sup> *Knapp v. Altoneyer*, 38 N. Y. Superior Ct. (J. & S.) 161, and *Shanks v. Lancaster*, 5 Gratt (Va.) 110; *Green v. Chelsea*, 24 Pick. (Mass.) 71; *Jackson v. Blanshaw*, 3 Johns. (N. Y.) 292; *Troup v. Hurlbut*, 10 Barb. (N. Y.) 354; *Clark v. Wood*, 34 N. H. 447; *Zeigler v. Houtz*, 1 Watts & S. (Pa.) 533; *Duncan v. Beard*, 2 Nott & M. (S. C.) 400; *Stockbridge v. West Stockbridge*, 14 Mass. 257; *Winston v. Guathmey*, 8 B. Mon. (Ky.) 19; *Crane v. Marshall*, 16 Me. 27; *Hall v. Gittinas*, 2 Har. & J. (Md.) 380; *Jackson v. Davis*, 5 Cowan, 123; *Nixon v. Porter*, 34 Miss. 697; *Fairly v. Fairly*, 38 Miss. 280; *Ridgely v. Johnson*, 11 Barb. (N. Y.) 527; *Homer v. Cilley*, 14 N. H. 85; *Bank of Middlebury v. Rutland*, 33 Vt. 414; *Dishager v. Maitland*, 12 Leigh (Va.) 524; *Williams v. Hillegas*, 5 Pa. St. 492; *Middleton v. Mass*, 2 Nott & M. (S. C.) 55; *Smith v. Rankin*, 20 Ill. 14; *Jackson v. Brooks*, 8 Wend. 426; *Wilson v. Betts*, 4 Denio, 201; *Dobson v. Finley*, 8 Jones (N. C.) 495; *Swygart v. Taylor*, 1 Rich. (S. C.) 54; *Stump v. Hughes*, 5 Hayw. 93; *M'Cormick v. M'Murtrie*, 4 Watts (Pa.) 192; *Bellas v. Levan*, *Id.* 294; *M'Call v. Sybert*, *Id.* 431; *Goddard v. Glolinger*, 5 *Id.* 209; *Urket v. Coryell*, 5 Watts & S. (Pa.) 60; *James v. Salsler*, 8 Watts & S. 192; *Pitts v. Temple*, 2 Mass. 538; *Carter v. Chaudron*, 21 Ala. 72; *Beall v. Dearing*, 7 Ala. 124; *Doe v. Eslava*, 11 Ala. 1028; *Doe v. Roe*, 31 Ga. 593; *Hedger v. Ward*, 15 B. Mon. (Ky.) 106; *Reaume v. Chambers*, 22 Mo. 36; *Jackson v. Davis*, 5 Cow. (N. Y.) 123; *Hawley v. Bennett*, 5 Paige (N. Y.) 104; *Clark v. Owens*, 18 N. Y. 434; *Archibald v. Davis*, 4 Jones (N. C.) L. 133; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Parris v. Ewbanks*, 1 Spears. (S. C.) 83; *Robinson v. Gilman*, 3 Vt. 163; *Dobson v. Finley*, 8 Jonck (N. C.) L. 495; *Fairly v. Fairly*, 28 *Id.* 280.

writing proved, as in the case of a deed. (o) But since the Common-Law Procedure Act, 17 & 18 Vict. c. 125, s. 26, and the 28 Vict. c. 18, ss. 1, 7, it is not necessary, either in civil or criminal proceedings, to prove by the attesting witness, any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto. And so, by the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 526, any document required by that act to be executed in the presence of, or to be attested by, any witness or witnesses, may be proved by the evidence of any person who is able to bear witness to the requisite facts, without calling the attesting witness or witnesses, or any of them. Where there is no attesting witness the usual proof is by the handwriting of the party. The proof of handwriting is so important and peculiar that it will be considered separately. (p)

222. Next as to wills. By the statute of frauds, 29 Car. 2, c. 3, s. 5, it was enacted, that all devises and bequests of lands or tenements to be valid, should be in writing and signed by the party, or by some other person in his presence and by his express directions, and be attested and subscribed in his presence by at least three credible witnesses. Wills of personality remained as at the common law, and did not require any witness. But by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, this part of the statute of frauds is repealed; and it is enacted by sect. 9, that "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to

(o) *Earl of Falmouth v. Roberts*, 9 2 M. & Sel. 62; *Higgs v. Dixon*, 2 M. & W. 469; *Streeter v. Bartlett*, 5 Stark. 180.  
C. B. 562; *Doe d. Sykes v. Durnford*, (p) See *infra*, ch. 2.

say) ; it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." In carrying out the provisions of this enactment, many wills, just and regular in all other respects, were rendered inoperative for inadvertent non-compliance with the forms which it prescribed. To remedy this was passed the 15 & 16 Vict. c. 24, s. 1, which, after reciting sect. 9 of the previous act, enacts, that "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will, that the testator intended to give effect by such his signature to the writing signed as his will ; and that no such will shall be affected by the circumstance, that the signature shall not follow or be immediately after the foot or end (g) of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circum-

(g) *Qu.*, *Hurt v. Hunt*, L. Rep., 1 P. & D. 209.

stance that the signature shall be on a side or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on, or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act, shall be operative to give effect to any disposition or direction which is underneath or which follows it, (r) nor shall it give effect to any disposition or direction inserted after the signature shall be made.”<sup>1</sup>

223. Although documents are necessarily brought before the tribunal by means of verbal or parol evidence, that evidence must be limited to giving such a general description of the document as shall be sufficient to identify it, and deposing to the real evidence afforded by its visible state. Thus a keeper of records may speak as to the condition in which they are, but not as to their contents. (s) It is commonly said that “Parol evidence is inferior (or secondary) to written;” that “Written evidence is superior to verbal,” &c.; (t) but these axioms must be understood with much allowance and qualification. That evidence in writing, using the phrase *latiori sensu*, is superior to or even more satisfactory than verbal evi-

(r) See *In the Goods of Wotton*, L. Rep., 3 P. & D. 159.

(t) *Contra scriptum testimonium, non scriptum testimonium non fertur.*

(s) *Leighton v. Leighton*, 1 Str. Cod. lib. 4, tit. 20, l. 1.  
210.

<sup>1</sup> *McMichael v. Bankston*, 24 La. Ann. 451. As to lost wills, see *Hall v. Allen*, 31 Wis. 691. As to ancient will, see *Parris v. Eubanks*, 1 Spears (S. C.) 183.

dence cannot, as a general proposition, be supported. Suppose a man witnesses a transaction, and after he goes home commits a narrative of it to paper, or even puts his seal to the paper, and fifty men attest it as witnesses; whether his memory or that paper would be the best and more trustworthy proof of what took place, depends very much on circumstances; such as the natural strength of his memory, whether the transaction were of a nature likely to make an impression on his mind, the time that has elapsed, &c. It is true that the writing has the advantage of permanence; it will not decay so soon as the memory of the witness—"Vox audita perit; litera scripta manet."<sup>1</sup> But on the other hand the witness may be cross-examined, and compelled to give a circumstantial account of all he saw and heard; while the writing only preserves what was committed to it in the first instance, without power of addition or explanation—"Minus obstitisse videtur pudor inter paucos signatores;" (*u*) "Testibus, non testimoniis, credendum;" (*x*)—added to which, the evidence of the witness would be given under the sanction of an oath. So, considered merely with reference to probative force, the notes of the judge, taken at a trial, would probably be deemed very satisfactory evidence of what there took place. They are not, however, even receivable as evidence of it. A judge only takes notes for his own private convenience; there is no law requiring him to do so: (*y*) indeed in former times, the judges either made no notes, or notes much more scanty than at present; and of Pratt, C. J., in

(*u*) Quint. Inst. Orat. lib. 5, c. 7.

(*y*) Per Lord Abinger, C. B., in

(*x*) Burnett's Crim. Law of Scotland, 495. Leach v. Simpson, 5 M. & W. 309, 311.

<sup>1</sup> The spoken word perishes; the written word remains. See Morgan's Law of Literature, vol. 1, pp. 105, 162.

particular, it is said that he never made any. (z) The truth is, that the maxims in question have three applications. 1. In the case of records and other instruments, which the policy of the law requires to be in writing and executed with prescribed formalities, no derivative, and consequently no verbal, or other parol (a) evidence of their contents is receivable, until the absence of the original writing is accounted for; neither is parol or other extrinsic evidence receivable, at least in general, to contradict, vary, or explain them.<sup>2</sup> 2. A like rule holds where writing or formal-

(z) See the note to 17 Ho. St. Tr. 1420.

(a) This is not the only instance in our law where the word "parol" is used in a different sense from "verbal"

or "oral." Thus, written contracts not under seal are said to be parol "contracts," &c. *Rann v. Hughes*, 7 T. R. 350-1, note.

<sup>1</sup> See *ante*, note 1, p. 399.

<sup>2</sup> See Morgan's *Addison on Contracts*, vol. 1, p. 363, section II., and cases cited (*Huse v. McQuade*, 52 Mo. 388; *Clark v. N. Y. Life Ins. Co.*, 7 Lans. (N. Y.) 323; *Kerr v. Kuykendall*, 44 Miss. 137; *Howlett v. Howlett*, 56 Barb. 467; *Campbell v. Johnson*, 44 Mo. 247; *Delano v. Goodwin*, 48 N. H. 203; *Perkins v. Young*, 82 Mass. (16 Gray) 389; *Cocke v. Bailey*, 42 Miss. 81; *Kirk v. Hartman*, 63 Pa. St. 97).

Parol evidence cannot be received to show that by the general term "nephews," a testator meant to include illegitimate nephews. But if it be shown that he had no legitimate nephews, the ambiguity would be explainable by parol evidence (*Brower v. Bowers*, 1 Abb. (N. Y.) App. Dec. 214; *Harris v. Rathbun*, 2 Id. 326).

Exceptions to the rule occur to show circumstances or conditions of signing (*Robertson v. Evans*, 3 S. C. 330). Or to explain an erasure (*Johnson v. Pollock*, 58 Ill. 181). Or as to technical terms, or to show that it is an illegal contract (*Martin v. Clark*, 8 R. I. 389, and the like). And by various other circumstances arising in particular cases. See *Weaver v. Fletcher*, 27 Ark. 510; *Basshor v. Forbes*, 36 Md. 154; *Arberter v. Day*, 39 Conn. 155; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Dixon v. Cook*, 47 Miss. 220. And see cases cited in note 1, p. 183. *Letcher v. Letcher*, 50 Mo. 137; *Washington Ins. Co. v. St. Mary's Seminary*, 52 Id. 480; *McClelland v.*

ties are not required by law, but the parties have had recourse to them for the sake of greater solemnity and security; as where a man executes a bond to secure James, 33 Iowa, 571; *Bell v. Woodman*, 60 Me. 465; *Allen v. Sowerby*, 37 Md. 410; *Babbett v. Young*, 51 N. Y. 237; *Willis v. Fernald*, 33 N. J. L. (4 Vr.) 206; *Howlett v. Howlett*, 56 Barb. 467; *Donley v. Findall*, 32 Tex. 43; *Martin v. Clark*, 8 R. I. 389; *Suffern v. Butler*, 21 N. J. Eq. 410; *De Coolff v. Crandall*, 1 Sweeney (N. Y.) 556; *Black v. Columbian Ins. Co.* 42 N. Y. 393; *Richards v. Schlegelmich*, 65 N. C. 150; *Foster v. McGraw*, 64 Pa. St. 464; *Anthony v. Atkinson*, 2 Sweeney, 228; *Leppoc v. National, &c. Bank*, 32 Md. 136; *Moore v. State*, 3 Heisk. 493; *Brower v. Bowers*, 1 Abb. (N. Y.) App. Dec. 214; *Grimes v. Harmon*, 35 Ind. 198; *McCray v. Lepp*, Id. 116; *Puckman v. Ransom*, 35 N. J. L. 565; *McDermott v. Hoffman*, 70 Pa. St. 31; *Commonwealth v. Moran*, 107 Mass. 239; *Langdon v. Hughes*, 107 Id. 272; *Mayor, &c. of N. Y. v. Exchange Fire Ins. Co.*, 3 Abb. (N. Y.) App. Dec. 261; *Bultes v. Repp*, Id. 78; *Donnell v. Humphreys*, 1 Mon. T. 518; *King v. Fink*, 51 Mo. 209; *Means v. De la Vergne*, 50 Id. 343; *Miller v. McCoy*, Id. 214; *Slosson v. Hall*, 17 Minn. 95; *Clarke v. Lancaster*, 36 Md. 196; *Smith v. Dallas*, 35 Ind. 255; *Ball v. Benjamin*, 56 Ill. 105; *Borland v. Walrath*, 33 Iowa, 130; *Bancroft v. Grover*, 23 Wis. 463; *Orton v. Harvey*, Id. 99; *Durham v. Gill*, 48 Ill. 151; *Nanderkan v. Thompson*, 19 Mich. 82; *Lancan v. Phœnix, &c. Ins. Co.*, 56 Me. 562; *Robinson v. McNiell*, 51 Ill. 225; *Kimball v. Myers*, 21 Mich. 276; *Elston v. Kinnicott*, 52 Ill. 272; *Hammond v. Hannin*, 21 Mich. 374; *Swekham v. Stockham*, 32 Md. 196; *Selby v. Friedlander*, 22 La Ann. 381. Also a vast number of cases brought together and cited in *Abbott's United States Digest* (N. S.), vol. 5, p. 578.

Parol evidence is admissible however to show fraud (*Haynes v. Hayward*, 41 Me. 488; *Leonard v. Smith*, 11 Metc. (Mass.) 330; *Phyfe v. Wardell*, 2 Edw. (N. Y.) 47; *Elliott v. Connell*, 13 Miss. (5 Smed. & M.) 91; *Kennedy v. Kennedy*, 2 Ala. 571; *Blanchard v. Moore*, 4 J. J. Marsh. (Ky.) 471; *Huston v. Noble*, Id. 130; *Anderson v. Bacon*, 1 A. K. Marsh. (Ky.) 48; *Martin v. Lewis*, Id. 102; *Wesley v. Thomas*, 6 Har & J. (Md.) 24; *Watkins v. Stockett*, Id. 435; *Chetwood v. Brittain*, 2 N. J. Eq. (1 Green.) 438; *Koe v. Handy*, 41 Barb. (N. Y.) 454; *Waddell v. Glassell*, 18 Ala. 561; *Bottomley v. United States*, 1 Story, 135; *Townsend v. Cowler*, 31 Ala. 428; *Lunday v. Thomas*, 26 Ga. 538; *Pierce v. Wilson*, 34 Ala. 596; *Hamilton*



the payment of money, when an unattested writing would have been sufficient; or where a contract for the sale of goods under £10 (and consequently not within the statute of frauds), is reduced to writing, &c. (b) 3. Where the contents of any document are in question, either as a fact directly in issue or a sub-alternate principal fact, the document is the proper evidence of its own contents. (c) But where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some act, independent proof aliunde is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. (d)<sup>1</sup> Or, suppose a man had declared by deed, or even put on record—if such a thing can be supposed—his intention

(b) See the distinction taken in *Buxton v. Cornish*, 12 M. & W. 426; *Bellamy's Case*, 6 Co. 38, between deeds "ex institutione legis" and "ex provisione hominis." See, also, *per Cutler*, 21 H. VII. 5 B. pl. 2; *Knight v. Barber*, 16 Id. 66; and *Dig. lib. 22. tit. 4, ll. 4 and 5.*  
 (c) *Infra*, bk. 3, pt. 2, ch. 3.  
 (d)<sup>1</sup> *Rambert v. Cohen*, 4 Esp. 213.

*v. Congers*, 28 Ga. 276; *Gatling v. Newell*, 9 Ind. 572; *Stannard v. McCarty*, 1 Morr. (Iowa), 124; *Hunt v. Carr*, 3 Iowa, 581; *Akin v. Drummond*, 2 La. Ann. 92; *Morris v. Terrenoire*. Id. 458; *Williams v. Vane*, Id. 908; *Rachal v. Rachal*, 4 Id. 500; *Gayoso v. Delaroderie*, 9 Id. 278; *Davis v. Stern*, 15 Id. 177; *Garrett v. Crooks*, Id. 483; *Barbin v. Gaspard*, Id. 439; *Farrell v. Bean*, 10 Md. 217; *Holbrook v. Burt*, 22 Pick. (Mass.) 546; *Sanford v. Handy*, 23 Wend. (N. Y.) 1260; *Bartle v. Vasbury*, 2 Grant (Pa.) Cas. 277; *Hunter v. Bilyen*, 30 Ill. 228; *Baltimore, &c. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Stark v. Littlepage*, 4 Rand. (Va.) 368; *Hunt v. Rousmanier*, 8 Wheat. 174; *McMahon v. Sprangler*, 4 Rand. (Va.) 51; *Selden v. Myers*, 20 How. 506.

<sup>1</sup> See *Wilson v. Dear*, 69 N. C. 137; *Joslyn v. Capron*, 64 Barb. 599; *Eaton v. Alger*, 2 Abb. (N. Y.) App. Dec. 5; *Nelson v. Robson*, 17 Minn. 284; *Knablanck v. Krouchnakel*, 8 Id. 300; *Thrasher v. Anderson*, 45 Ga. 539; *Stapleton v. King*, 33 Iowa, 28

to rob or murder another, this would not exclude verbal or other evidence, that he had made similar declarations of intention by word of mouth. So, although where the contents of a marriage register are in issue, verbal or other evidence of those contents is not receivable, the fact of the marriage may be proved by the independent evidence of a person who was present at it. This distinction is well illustrated by the case of *Horn v. Noel*, (*e*) in which it was proposed to support the defense of the coverture of the defendant, by two witnesses who deposed that they were present in a Jewish synagogue, when the defendant was married to H. N. The plaintiff's counsel contended that this evidence was insufficient ; that it was . . necessary for the defendant to show that a marriage had been celebrated according to the rites of the Jews ; that with them, what took place in the synagogue was merely a ratification of a previously written contract ; and as that contract was essential to the validity of the marriage, it ought to be produced and proved. (*f*) The contract, in the Hebrew tongue, was accordingly put in, and translated by means of an interpreter, and the plaintiff was nonsuited.<sup>1</sup> It must also be added, that the rule excluding parol evidence as inferior to written, does not exclude circumstantial,

(*e*) 1 Camp. 61.

(*f*) See, on this subject, Rogers's Eccl. Law, 659, 2nd ed.

<sup>1</sup> See *Wilkie v. Collins*, 48 Miss. 497 ; *Brower v. Bowers*, 1 Abb. (N. Y.) App. Dec. 214. Plaintiff's name was John Gottlieb Kimmel, his wife was known as Philopena Kimmel, and there was evidence that her maiden name was Utz. In an action for criminal conversation in which it was necessary to prove actual marriage, a certificate of marriage in Wurtemberg between John Gottlieb Kimmel and Sabrina Philopena Utz was held to be evidence of the marriage, without other identification of the persons (*Hutchins v. Kimmel*, 30 or 31 Mich. ; *American Law Register*, April, 1875).

(*g*) nor, according to the better opinion, self-disserving evidence. (*h*)

224. But although documentary evidence may not be receivable, for want of being verified on oath or its equivalent, or traceable to the party against whom it is offered, the benefit of its permanence is not always lost to justice. Thus, a witness who has drawn up a written narrative, or made a written memorandum of a matter or transaction, may in many cases use it while under examination, as a script to refresh his memory. (*i*)<sup>1</sup>

225. As connected with this subject may be noticed the maxim of law, "*Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est.*" (*k*) "*Quomodo quid constituitur,*" says one of our old books, "*eodem modo dissolvitur*; record per record, escript per escript, (*l*) parliament per parliament, parol per parol." (*m*) For instance, things that lie in grant, as they must be created by deed, cannot be surrendered without deed. (*n*) This principle was also recognized by the Roman law—"Nihil tam naturale est, quam eo genere quicquid dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu

(*g*) Bk. 3, pt. 2, ch. 1.

(*h*) Bk. 3, pt. 2, ch. 7.

(*i*) Sandwell v. Sandwell, Comb. 445; Holt, 295; Doe d. Church v. Perkins, 3 T. R. 749; Burton v. Plummer, 2 A. & E. 341; Beech v. Jones, 5 C. B. 696; Smith v. Morgan, 2 Moo. & R. 257; 2 Phill. Ev. 480 et seq., 10th ed.; Dyer v. Best, 4 H. & C. 189.

(*k*) 2 Inst. 360, 573; 4 Inst. 28; 2 Co. 53 a; 4 Id. 57 b; 5 Id. 26 a; 6

Id. 43 b; Jenk. Cent. 2, Cas. 25; 3 Scott, N. R. 215; 17 Q. B. 146.

(*l*) By "escript" here must be understood a writing under seal. The word is often used in our old books in this sense. See *supra*, § 217, note (k).

(*m*) Jenk. Cent. 2 Cas. 2, Cas. 40. See Wood v. Leadbitter, 13 M. & W. 838.

(*n*) Wing. Max. 69; Co. Litt. 338 a.

<sup>1</sup> See Kan v. Stivers, 34 Iowa, 123.

dissolvitur." (*o*)<sup>1</sup> But the performance of a condition in an instrument under seal, may be proved by inferior evidence; (*p*) for this does not invalidate the instrument, but sets it up. Thus, payment of a bond may be proved by parol, &c. (*q*)

226. It has been already stated, (*r*) and is indeed an obvious branch of the principle in question, that "parol," or, to speak more correctly, "extrinsic" evidence, is not in general receivable to contradict, vary, or explain written instruments. "It would be inconvenient," says one of our old books, "that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory." (*s*) But there are many cases where the rejection of such proof would be the height of injustice, and even be absurd. 1. With respect to the varying or explaining of instruments there are two rules, "*Ambiguitas verborum patens nullâ verificatione excluditur*;" (*t*) "*Ambiguitas verborum latens verificatione suppletur*; nam quod ex facto oritur ambiguum, verificatione facti tollitur." The following commentary by Lord Bacon on the latter of these maxims, is the recognized basis of the law governing this subject. (*u*) "There be two sorts of ambiguities of words. the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and

(*o*) Dig. lib. 50, tit. 17, l. 35.

(*r*) *Supra*, § 223.

(*p*) See the authorities cited in  
West v. Blakeway, 3 Scott, N. R. 199.

(*s*) 5 Co. 26 a.

(*t*) Loft. Max. 249.

(*q*) Doct. & Stud. Dial. 1, ch. 12.

(*u*) Bac. Max. of the Law, Reg 23

<sup>1</sup> See Broom's Legal Maxims, p. 794\*.

without ambiguity, for anything that appeareth upon the deed or instrument ; but there is some collateral matter out of the deed that breedeth the ambiguity. Ambiguitas patens is never holpen by averment ; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law ; for that were to make all deeds hollow, and subject to averments. and so in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore if a man give land to I. D., et I. S. et hæredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. So if a man give land in tail, though it be by will, the remainder in tail, and add a proviso in this manner : Provided that if he, or they, or any of them do any, &c. according to the usual clauses of perpetuities, it cannot be averred upon the ambiguities of the reference of this clause, that the intent of the devisor was, that the restraint should go only to him in the remainder, and the heirs of his body ; and that the tenant in tail in possession was meant to be at large. Of these, infinite cases might be put ; for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty. But if it be ambiguitas latens, then otherwise it is ; as if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all ; but if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact, and, therefore, it shall be holpen by averment, whether of them was

that the party intended should pass. So if I set forth my land by quantity, then it shall be supplied by election, and not averment. As if I grant ten acres of wood in Sale where I have 100 acres, whether I say it in my deed or no, that I grant out of my 100 acres, yet there shall be an election in the grantee, which ten he will take. And the reason is plain, for the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken; and there being no cause to help the uncertainty by intention, it shall be holpen by election. But in the former case the difference holdeth, where it is expressed and where not; for if I recite, Whereas, I am seized of the manor of North S. and South S., I lease unto you unum manerium de S., there it is clearly an election. So if I recite, Where I have two tenements in St. Dunstan's, I lease unto you unum tenementum, there it is an election, not averment of intention, except the intent were of an election, which may be specially averred. Another sort of *ambiguitas latens* is correlative unto these; for this ambiguity spoken of before, is when one name and appellation doth denominate divers things, and the second, when the same thing is called by divers names. As if I give lands to Christ Church, in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words; for this variance is matter in fact, but the averment shall not be of intention, because it doth stand with the words. For in the case of equivocation the general intent includes both the special, and, therefore, stands with the word; but so it is not in variance, and, therefore, the averment must be of matter, that do endure quantity, and not in-

tention. As to say of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was, that the grant should be to Christ Church in that University of Oxford." A host of cases on this subject, with numerous qualifications and distinctions, are to be found in the books. (*x*) We will merely add the following important observations, from the work of Vice-Chancellor Wigram, "Extrinsic Evidence in the Interpretation of Wills." (*y*) "A written instrument is not ambiguous, because an ignorant and uninformed person is unable to interpret it. It is ambiguous, only if found to be of uncertain meaning, when persons of competent skill and information are unable to do so. Words cannot be ambiguous, because they are unintelligible to a man who cannot read; nor can they be ambiguous, merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow that the question, whether a will is ambiguous, might be dependent, not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy,—a proposition too absurd for an argument. . . . Again, a distinction

(*x*) See the cases collected in 2 Phill. Ev. chap. 8, 10th ed.; and Wigram's "Extrinsic Evidence in the Interpretation of Wills," 4th ed. And see, also, *Grant v. Grant*, L. Rep., 5

C. P. 380; S. C. (in Cam. Scacc.), Id. 727; *Sherratt v. Mountford*, L. Rep., 8 Ch. App 928.

(*y*) § 200 et seq., 4th ed.

must be taken between inaccuracy and ambiguity of language. Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one leasehold house in a given place, and no other house, were to devise his freehold house there to A. B. the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage, are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language."<sup>1</sup>

227. 2. There are some other exceptions to the rule rejecting intrinsic evidence to affect written instruments. Foremost among them come those cases where it is sought to impeach written instruments as

<sup>1</sup> See, as to latent and patent ambiguity, Morgan's Addison on Contracts, vol. 1, p. 338, § 222, et seq., and cases cited. See *Morris v. Edwards*, 1 Ohio, 189; *Cabot v. Wendson*, 11 Allen, 546; *Hinneman v. Rosenback*, 39 N. Y. 98; *Richardson v. Beede*, 43 Me. 161; *Brown v. Cambridge*, 3 Allen, 474; *Buswell v. Poiner*, 32 N. Y. 312; *Eaton v. Alger*, 2 Keyes, 41; *The Lady Franklin*, 8 Wall. 325; *Tucker v. Maxwell*, 11 Mas. 143; *Johnson v. Johnson*, Id. 359, 363; *Johnson v. Weed*, 9 Johns. 310; *Delaney v. Towns*, 1 Allen, 407; *Wilkinson v. Scott*, 17 Mass. 249; *Putman v. Lewis*, 8 Johns. 389; *City Bank v. Adams*, 45 Me. 455; *Billings v. Billings*, 10 Cusn. 178; *Shaw v. Shaw*, 50 Me. 94; *Parker v. Syracuse*, 31 N. Y. 376; *Nichols v. Williams*, 7 C. E. Green, 63; *Young v. Gregory*, 46 Me. 475; *Gould v. Norfolk Lead Co.* 9 Cush. 338; *Rogers v. McPheters*<sup>4</sup> 40 Me. 114; *Whitney v. Slayton*, 40 Id. 224.



having been obtained by duress, (*z*) menace, (*a*) fraud, covin, or collusion; (*b*) which, as is well known, vitiate all acts, however solemn, or even judicial. (*c*) “Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit” (*d*)—“Dolus et fraus nemini patrocinantur” (*e*)—“Jus et fraus nunquam cohabitant” (*f*)—“Qui fraudem fit frustà agit” (*g*)—“Dolus circuitu non purgatur.” (*h*) To reject parol or other extrinsic proof in such cases, would be to apply the rule in question to a purpose for which it was never intended, and to render it a protection to practices which the object of the law is to suppress. But the party to an instrument is estopped from setting up his own fraud, &c. to avoid the instrument; (*i*) as also are those claiming under him; and the like rule holds in the case of menace or duress. (*k*) These principles are found in the laws of other countries as well as our own, (*l*)—

“ ————Nec lex est justior ulla,  
Quam necis artifices arte perire suâ.” (*m*)

228. 3. Another exception is to be found in the admissibility of the evidence of usage; “Optimus in-

(*z*) Dig. lib. 50, tit. 17, l. 116; Perkins, § 16; Bac. Max. Reg. 6; 6 Ho. Lo. Cas. 44, 45; 11 Q. B. 112; 2 Exch. 395; 6 Exch. 67.

(*a*) Dig. in loc. cit.; Bac. Max. R. 22; Shep. Touch. 61; 11 A. & E. 990; 6 Q. B. 280.

(*b*) Dig. lib. 44, tit. 4; Gilbert, Corp. Jur. Can. Prolegom. Pars. Post. pp. 27 and 28.

(*c*) That judicial acts may be impeached for fraud, see bk. 3, pt. 2, ch. 9.

(*d*) Bac. Max. Reg. 22.

(*e*) M. 30 Edw. III. 32; 14 Hen. VIII. 8 A.; 39 Hen. VI. 50, pl. 15; 1 Keb. 546.

(*f*) 10 Co. 45 a.

(*g*) 2 Roll. 47.

(*h*) Bacon, Max. Reg. 1.

(*i*) 2 Phill. Ev. 360, 10th ed. See bk. 3, pt. 2, ch. 7.

(*k*) Bracton, lib. 2, c. 5, fol. 15 b; Dyer, 143 b, pl. 56; Plowd. 19; Shep. Touch. 60, 61; Atlee v. Backhouse, 3 M. & W. 650, per Parke, B.

(*l*) Dig. lib. 4, tit. 2; Cod. lib. 8, tit. 54, l. 27; Lancel. Inst. Jur. Canon. lib. 2, tit. 25, § 13; Domat, Lois Civiles, pt. 1, liv. 3, tit. 6, sect. 2, § 5; Code Civil. liv. 3, tit. 3, chap. 6, sect. 3, § 2, art. 1353; Bonnier, Traité des Preuves, § 643, &c.

(*m*) 1 H. Bl. 585.

terpres rerum usus." (*n*) "Magister rerum usus." (*o*) "Consuetudo loci est observanda." (*p*) Many of the cases on this subject will be found collected in Broom's Maxims; (*q*) and the general principles by which it is governed are thus clearly laid down in a work of authority. "Evidence of usage has been admitted, in aid of the construction of written instruments. This evidence has been received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind—when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost a foreign language. The terms used in these instruments are to be interpreted, according to the recognized practice and usage with reference to which the parties are supposed to have acted; and the sense of the words, so interpreted, may be taken to be the appropriate and true sense intended by the parties." (*r*) "Evidence of usage has been admitted, in contracts relating to transactions of commerce, trade, farming, or other business—for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them, or with the relations growing out of them; and the evidence in such cases is admitted, with the view of giving effect, as far as can be done, to the presumed intention of the parties. Where the language of the

(*n*) 2 Inst. 282.

(*q*) Pp. 882–896, 4th ed.

(*o*) Co. Litt. 229 b.

(*r*) 2 Phill. Ev. 407 10th ed. See

(*p*) 6 Co. 67 a; 7 Id. 5 a; 10 Id. also 2 Stark. Ev. 361, 3rd ed.

contract itself manifests an intention to exclude the operation of usage, evidence of usage cannot be admitted. And in all cases in which this evidence is admitted, it must be presumed that the usage was known to the contracting parties, and that they contracted in reference to it, and in conformity with it. (s) With this understanding, the reception of evidence of usage is not only justifiable in principle, but absolutely necessary; and without it, the intention of the parties would be often defeated. Usage may be proved, though not general; it may be local, and to small extent—or professional—or only in a particular branch of business, or among a particular class of persons. Even the usage, or rather the practice of an individual firm, with which a party has contracted, may be resorted to as a medium of exposition, if it may be reasonably inferred that he contracted in reference to such practice.” (t)

But “the rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to, or inconsistent with, the written contract. It ought never be allowed to vary or contradict the written instrument, either expressly or by implication. (u) So, although, where “the language of ancient charters is become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted to for the purpose of explanation,” still “it can never be admitted, to control or contradict the express provisions of the instrument.” (x) And, lastly, where the incident sought to be annexed to a contract, is of such a nature that the

(s) See, as to this, *Kirchner v. Ven- nus*, 12 Moo. P. C. 361, 399.

(t) 2 Phill. Ev. 415-16, 10th ed.

(u) 2 Phill. Ev. 417, 10th ed.

(x) *Id.* 419.

parties are not themselves competent to introduce it, by express stipulation, such an accident cannot be annexed by the tacit stipulation arising from usage. *E.g.*, the parties to a contract which is not, by law, negotiable cannot make it negotiable by an express stipulation to that effect; and, therefore, the incident of negotiability cannot be added to such a contract by evidence of usage. (*γ*)

229. It seems a rule of universal jurisprudence, that imperfections or blemishes apparent on the face of a document, such as interlineations, erasures, &c., do not vitiate the document, unless they are in some material part of it. (*z*) One of our old books lays down generally, that "an interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after." (*a*) Other authorities seem disposed to extend this doctrine to erasures; (*b*) and both positions have been confirmed by the Court of Queen's Bench. (*c*) But that an erasure or alteration in a suspicious place, must be explained by the party seeking to enforce the instrument, has been law from the earliest times. (*d*) And this principle is fully recognized at the present day, (*e*) especially where an alteration affects the stamp required for a document. (*f*) The whole sub-

(*γ*) *Crouch v. Crédit Foncier of England*, L. Rep., 8 Q. B. 374, 386.

(*z*) *Mascard. de Prob. Concl.* 256, 284; *Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 43*, *Devot. Inst. Canon. lib. 3, tit. 9, § 21*, 5th ed.; *Fleta*, lib. 6, c. 34, s. 5; *Co. Litt.* 225 b; 10 *Co.* 92 b; *Cro. Car.* 399; *Dicks. Law Ev. in Scotl.* 179. The rule laid down in *Pigot's Case*, viz., that the alteration of a deed by the obligee himself, although it be in words not material, makes the deed void, has been held not to be law. *Aldous v. Cornwell*, L. Rep., 3 Q. B. 573, 579.

(*a*) *Trowel v. Castle*, 1 *Keb.* 21 (5), recognized *Butl. Co. Litt.* 225 b, note (1).

(*b*) *Shep. Touch.* 53, note (1), 8th ed.

(*c*) *Doe d. Tatum v. Catomore*, 16 *Q. B.* 745. See also, per Lord Cranworth, *V. C.*, *Simmons v. Rudall*, 1 *Sim. N. S.* 115, 136.

(*d*) 7 *Edw. III.* 57, pl. 44; and 27, pl. 13.

(*e*) *Earl of Falmouth v. Roberts*, 5 *M. & W.* 469.

(*f*) *Knight v. Clements*, 3 *A. & E.* 215.

ject is however guarded by many restrictions and limitations. (*g*) And in the case of wills, the presumption seems to be the other way;—the rule being that, having regard to the statute of frauds, and the 7 Will. 4 & 1 Vict. c. 26, s. 21, the onus is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence, from which the jury may infer that the alteration was made before the will was executed. (*h*)<sup>1</sup>

230. Various acts of parliament—for the system is unknown to the common law—have imposed, as a condition precedent to the admissibility in evidence of most documents, the pre-payment to the state of a sum of money, the receipt of which is indicated by a “stamp,” affixed by a public officer. An exposition of

(*g*) See Tayl. Ev. §§ 1616–1638, 4th ed.; 1 Smith. Lead. Cas. 776 et seq., 5th ed.; Pigot's Case, 11 Co. 26 b; Davidson v. Cooper, 11 M. & W. 778; 13 Id. 343.

(*h*) Cooper v. Bockett, 4 Moo. P. C. C. 419; Doe v. Shallcross v. Pallmer, 16 Q. B. 747, 755; In the Goods of Sykes, L. Rep., 3 P. & D. 26; Greville v. Tylee, 7 Moo. P. C. C. 320; Simmots v. Rudall, 1 Sim., N. S. 136.

See also Gann v. Gregory, 3 De G., Mac. & G. 777. But in a recent case it was said, that the court was not precluded, by the absence of direct evidence, from considering the nature of the alterations, and the internal evidence furnished by the document itself. Per Sir J. P. Wilde, in the Goods of Cadge, L. Rep. 1 P. & D. 543, 545.

<sup>1</sup> As to where a deed is offered in evidence, and is objected to for erasures, interlineations, or blank spaces supposed to be apparent on examination, see Johnson v. M'Gehee, 1 Ala. 186. A paper offered to be read in a suit will not be excluded because it contains irrelevant matter (Nicks v. Rector, 4 Ark. 251). It is no objection to the admissibility of a writing that it is made upon wood, if it would be admissible if made on paper (Kendall v. Field, 14 Me. 30). To make a document in a foreign language evidence for the jury, it must be translated (Meyer v. Witter, 25 Mo. 83). And though a paper be badly spelled, it will not on that account be rejected (Gilson v. Gilson, 16 Vt. 464; Morgan's Law of Literature, vol. 1, p. 165). And see, as to grammatical construction, Morey v. Homan, 10 Vt. 565.

the stamp laws would be wholly unsuited to this work: but there are two things connected with the subject which ought to be borne in mind. First, A document which is lost, (*i*) or not produced on notice, (*k*) will, in the absence of evidence to the contrary, be presumed to have been duly stamped. (*l*) Secondly, Although an unstamped document is not admissible as evidence of a binding contract between the parties, yet it is evidence for some collateral purposes; (*m*) as, for instance, to show illegality, or fraud, or misrepresentation, in a transaction of which the document formed part. (*n*) The principal case establishing this doctrine is that of *Coppock v. Bower*, (*o*) in which several others will be found cited. Lord Abinger, C. B., there says, "The object of both the statute and common law would be defeated, if a contract, void in itself, could not be impeached, because the written evidence of it is unstamped, and therefore inadmissible. If that were so, a party entering into such agreement might avoid the consequences of its illegality, by taking care that no stamp should be

(*i*) *Pooley v. Godwin*, 4 A. & E. 94; *Hart v. Hart*, 1 Hare, 1; *R. v. The Inhabitants of Long Buckby*, 7 East, 45.

(*k*) *Crisp v. Anderson*, 1 Stark. 35; *Closmadeuc v. Carrel*, 18 C. B. 36. See also the case of *Bradlaugh v. De Rin*, L. Rep., 3 C. P. 286, as to the presumption that an instrument, on which there is a stamp when produced at the trial, was stamped in proper time.

(*l*) If satisfactory evidence be given that, at any time after it was executed, the instrument was unstamped, this presumption is at an end, and the

party who relies on the instrument must prove that it was duly stamped. *Marine Investment Company v. Heav- iside*, L. Rep., 5 App. Ca. 624.

(*m*) *Mattheson v. Ross*, 2 Ho. Lo. Cas. 286; *Evans v. Prothero*, 2 Mac. & G. 319.

(*n*) *Coppock v. Bower*, 4 M. & W. 361; *R. v. Gompertz*, 9 Q. B. 524; *Holmes v. Sixsmith*, 7 Exch. 802; *Ponsford v. Walton*, L. Rep., 3 C. P. 167; *Ionides v. Pacific Insurance Company*, L. Rep., 6 Q. B. 674; *S. C.* (in Cam. Scac.), 7 Ib. 517.

(*o*) *Coppock v. Bower*, 4 M. & W. 361.

\* See the law of stamps considered in *Morgan's Addison on Contracts*, vol. iii., book iii.

affixed to it. I think, therefore, that in all cases where the question is, whether the agreement is void at common law or by statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility. As in the case of a conspiracy, or an agreement to commit a robbery, on no principle could it be contended, that a contract between the parties for the commission of such an offense would be inadmissible without a stamp. I think that the stamp acts are made for a different purpose—they are made to prevent persons from availing themselves of the obligatory force of an agreement, unless that agreement is stamped.”

**231.** Several important alterations in the law and practice relative to stamps, have been made by modern statutes. Thus, by the 17 & 18 Vict. c. 83, s. 27, it was enacted, that “Every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, though it may not have the stamp required by law impressed thereon or affixed thereto.” And this exemption was continued by the stamp act, 1870. (*p*)

And the 17 & 18 Vict. c. 125 (the common law procedure act, 1854), ss. 28, 29, and 31, contains the following provisions as to the admissibility of unstamped documents in civil cases, the two former of which have been re-enacted, in substance, by the stamp act, 1870: (*q*)

Sect. 28. “Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court whose duty it is to read such document, to call the attention of the judge to any omission or insufficiency of the stamp; and the

(*p*) 33 & 34 Vict. c. 97, s. 17.

(*q*) *Id.* s. 16.

document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid."

Sect. 29. "Such officer of the court shall, upon payment to him of the whole or (as the case may be) of the deficiency of the stamp duty payable upon or in respect of such document, and of the penalty required by statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds; . . . and the commissioners" of the inland revenue "shall, upon request, and production of the receipt hereinbefore mentioned, cause such documents to be stamped with the proper stamp or stamps, in respect of the sums so paid as aforesaid: Provided always, that the aforesaid enactment shall not extend to any document, which cannot now be stamped after the execution thereof on payment of the duty and a penalty."

Sect. 31. "No new trial shall be granted, by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp."



## CHAPTER II.

## PROOF OF HANDWRITING.

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232. In this chapter it is proposed to consider a species of proof necessarily much resorted to in judicial proceedings; but which presents many difficulties, and has in every age been found a source of embarrassment

to legislators, jurists, and practitioners—the proof of handwriting. (a)<sup>1</sup> We speak not of cases where the

(a) Much of this chapter has been taken from an article, by the author, in the *Monthly Law Magazine*, vol. 7, p. 120. The rules of the Roman law respecting handwriting are contained in *Novel. LXXIII.*, which, we are told in the beginning of it, was framed in consequence of the practice of counterfeiting handwriting, and the difficulties of a case which had arisen in Armenia. For the practice of the civilians, the reader is referred to *Cujacius*, in 73 *Nov.*; *Hubernus*, *Præl. Jur. Civ. lib. 22*, tit. 4, nn. 16 and 20;

*Voet. ad Pand. lib. 22*, tit. 4, n. 11; *Mascard. de Prob. Concl. 285*, 330, 331; and *Oughton, Ordo Judicior. tit. 225*. The framers of the *Codes Napoléon* seem to have been fully sensible of the difficulties attendant on this subject, and, while admitting proof of handwriting by comparison, have taken great pains to insure the genuineness of the specimens used for the purpose. *Code de Procédure Civile*, pt. 1, liv. 2, tit. 10, art. 192–213; *De la vérification des écritures*.

<sup>1</sup> The different volumes of reports furnish many interesting and valuable decisions concerning the feature of handwriting, some of which we propose examining. Where a court has admitted papers in evidence, the jury, before using them, must pass upon their genuineness (*State v. Ward*, 39 *Vt.* 225), and one method at their command in estimating them is by an inquiry into and a comparison of the chirography with other available specimens (*Adams v. Field*, 21 *Vt.* 256; *Gifford v. Ford*, 5 *Vt.* 532); but see *Rowt v. Kile*, 1 *Leigh*, 216. Though such a comparison cannot be employed as a ruse to get certain papers before the jury (*Guffey v. Deeds*, 29 *Pa. St.* 378). A letter, purporting by postmark and contents to come from a person whose signature a party wishes to prove, in answer to a letter proved to have been sent by the party to such person, has been held not to be evidence to prove, by comparison, the signature in dispute (*Disbrow v. Farron*, 3 *Rich. (S. C.)* 382). A writing which is so antiquated that no witness can be procured who has ever seen its signer write, must be proved by a comparison of handwritings (*Cantey v. Platt*, 2 *McCord (S. C.)* 260). Otherwise, the only admissible testimony [as is held in *Pope v. Askew*, 1 *Ired. (N. C.) L.*] is that of one who has seen the person write, or who has corresponded with him or paid drafts or checks for him. So also *Gordon v. Price*, 10 *Ired. (N. C.)* 385; but see *McKeone v. Barnes*, 108 *Mass.* 344; *Morey v. Safe Deposit Company*, 34 *N. Y. Superior Ct. (J. & S.)* 154; *Goodyear v. Vosburgh*, 63 *Barb. (N. Y.)* 154; *Kowing v. Mauley*, 49 *N. Y.* 193. Comparison of hands or not was held to be evidence in a criminal case in *United States v. Craig*, 4

fact that a certain document was written, is proved by eye-witnesses, or by the admissions of parties, or is inferred from circumstances; but of cases where a judg-

Wash. 29, but the contrary appears to have been held in *State v. Brunson*, 1 Root (Conn.) 307; *State v. Nettleton*, Id. 308; *People v. Hewitt*, 2 Park. (N. Y.) Cr. 20; *State v. Givens*, 5 Ala. 747; *Hoyt v. Stuart*, 3 Bosw. (N. Y.) 447.

In July, 1865, in the city of New Bedford, Massachusetts—an elderly maiden lady named Sylvia Ann Howland, died, leaving property to the amount of more than two millions of dollars. The contest in the courts for the possession of this large sum of money has called public attention to one of the strangest stories of cupidity, and perhaps attempted fraud, that were ever recorded elsewhere than in the pages of a work of fiction.

The Howland family had always been wealthy. When, in 1833, Miss Howland's grand-father, Isaac Howland, died, he left a fortune of two hundred and eighteen thousand dollars, in personal property, and thirty thousand dollars in real estate, one half of which his will gave to his grand-daughter, Sylvia Ann, and the other half to her sister Abby and her husband, Edward Mott Robinson, the latter being a New Bedford merchant, well known in his lifetime for his wealth, his mercantile skill, and his penuriousness. In 1847 Gideon Howland, the son-in-law and partner of Isaac, and the father of Sylvia Ann Howland and Abby Robinson, died, leaving another and larger fortune of six hundred and fifty thousand dollars, to be equally divided between Sylvia Ann and her brother-in-law, Mr. Robinson. Miss Howland's share in both these fortunes was allowed to remain invested in the business of the old firm, as was that of Mr. and Mrs. Robinson. The firm continued to prosper until, as we have said, Miss Howland's fortune had, in 1865, swelled to over two million dollars.

Edward Mott Robinson died in June, 1865, leaving a property of nearly six millions of dollars and an only daughter, Miss Hetty Howland Robinson. By his will he gave to this daughter about one million of dollars absolutely, and the income of the remaining five millions for life, the principal being given to her issue, or if she died without issue, to such persons as she appointed by will. She had besides some thirty thousand dollars, inherited from her mother and received by gift of her aunt. At this time the aunt, Sylvia Ann Howland, had two million dollars in her own right, and the

ment or opinion, that a given document is or is not in the handwriting of a given person, is based on the resemblance of the handwriting to, or its dissimilarity

niece, Hetty Howland Robinson, one million dollars in her own right, the income of five million dollars for life, and the certainty that the last five million dollars would go either to her children or to such persons as she might select.

When Sylvia Ann Howland died, in July, 1865, or one month after Mr. Robinson, a will was found, made by her in September, 1863, with a codicil added in November, 1864, both together giving to her niece, Miss Robinson, the income of one million of dollars for life, with remainder to members of the Howland family, and distributing the other million in legacies and charities. Dissatisfied with this meagre addition to her resources, Miss Robinson contested the will on the ground of mental and bodily infirmity in her aunt, and undue influence. This contest, however, she shortly after abandoned, and in December, 1865, commenced in the United States Circuit Court the extraordinary suit known as the Howland Will Case, and which involved the peculiar question of the identity of Miss Howland's signatures, whose consideration becomes valuable in this connection.

In beginning her suit Miss Robinson alleged that her aunt and herself, being very much displeased with the way in which her mother's share of the money which came from Isaac Howland had been taken possession of by her father, had entered into a mutual agreement, in 1860, each to make a will in the other's favor, to prevent Mr. Robinson's getting any more of the Howland property. In proof of this compact she exhibited a document, consisting of two sheets of paper—the one a will made by Miss Howland, giving her whole fortune to her niece, and the other a declaration of the reasons for making it, corresponding with Miss Robinson's statement. There was also a duplicate of this latter paper. Her bill of complaint set forth that Miss Howland's will of 1863 and the codicil to it were in violation of this compact, and should therefore be declared void.

Miss Howland's executors, under the latter will, defended the suit, not alone on legal grounds, which were finally adjudged to be sufficient, but on the more serious assertion that the signatures purporting to be the signatures of Sylvia Ann Howland to the declaration of mutual agreement and its duplicate, produced by her niece, were forgeries.

from that of the supposed writer, an acquaintance with which has been formed by means extraneous to that document. This is a species of circumstantial real

The trial of the cause was, as may be supposed from the amount of money and the scandal involved, long and stoutly contested. Miss Robinson, who in the meantime had been married to Mr. Edward H. Green, was the principal witness in her own behalf. Her story, as she tells it, reads not unlike a chapter from a sensational novel. She describes a visit to her aunt in 1860, picturing her as an invalid and a helpless old woman, surrounded by nurses looking constantly for her death and their own expected legacies. She tells of her aunt's indignation at the way in which her father had taken her mother's money, and how, in consequence, the alleged agreement was determined on. The two women sat down, and, with the help of a slate and an old form of will drawn by a lawyer, concocted, after several days' labor, a will giving Miss Robinson the whole of Miss Howland's property. This will, however, was not then executed.

In January, 1862, the matter again came up, the slate was again called into requisition, and the declaration of reasons made out in duplicate. The will drafted in 1860 was then executed, with a change of date to 1862, and the two duplicate declarations signed, one of them attached to the will, and the other retained by the niece. The will and the declarations were enclosed in a white envelope and put away. In 1865, after Miss Howland's death, Miss Robinson or Mrs. Green searched for this envelope, and found it among Miss Howland's papers, at the same time with the later will which she thought to set aside.

The executors, on the other hand, contended that Miss Howland never signed the duplicate declarations as alleged by Mrs. Green, but that Mrs. Green had forged her signatures by tracing them from the signature to the will to which the declaration refers, and which they admit to be genuine, the will itself being superseded by the later one they are defending. Their ground for making this charge was, that the three signatures are exact fac-similes of each other, which could not possibly be, if they were written, as they purport to have been, by Miss Howland herself, one after another.

On this point there were a large number of witnesses examined, and elaborate arguments made. The executors introduced a celebrated mathematician, Prof. Peirce, of Cambridge, to show

evidence, (*b*) and, like other species of circumstantial evidence, is not secondary to direct. Thus evidence of the nature in question is perfectly receivable, al-

(*b*) 2 Benth. Jud. Ev. 460.

that the odds are 2,866,000,000,000,000,000,000 to 1 that a human being could not write his name three times so exactly alike as the three alleged signatures of Sylvia Ann Howland. A large number of experts in writing and engraving testified that the two signatures to the duplicate declaration were actually copied from the genuine signature by placing the latter against a window pane, and writing the forgeries over it in pencil, and then tracing the pencil marks in ink. Mr. John E. Williams, President of the Metropolitan Bank said that he had no doubt of the spuriousness of the signatures, and other witnesses were equally positive.

In rebuttal of this formidable evidence Mrs. Green's counsel brought forward a number of instances in which confessedly genuine signatures were as nearly identical in appearance as the three in dispute—among them some of the late John Quincy Adams. Even genuine signatures of Sylvia Ann Howland herself were shown, which, when placed over one another, were as nearly alike as the alleged forgeries. Prof. Agassiz declared that he had examined the latter with the microscope, and could find no signs of tracing or painting of ink over lead-pencil marks. Others, writing teachers and engravers, asserted their belief that the signatures were genuine.

The Court ultimately escaped a decision of this perplexing question by deciding that even if the signatures were genuine, the agreement to which they were affixed was void. Mrs. Green subsequently withdrew her appeal.

In *Howland v. Taylor*, known as the *Taylor Will Case*, a question as to the forgery of the alleged testator's signature was very fully tried, and experts testified as follows:

Mr. Southworth, an expert, "I make as thorough and systematic an analysis as I can make, and judge of handwriting, not by the general effect, mechanical effect, but by the combination of characteristics which the writer himself does not usually observe, and which, perhaps, he does not know; the hand being a machine not subject to the will, because a person may have a will to write a very handsome hand, and not yet be able to do it.

"The hand, when set going, makes involuntarily the marks, while the eye is looking upon the paper; an effort to make a

though the writer of the supposed document is not examined to say whether he wrote it; (c) and this even if he were actually present in court; although the

(c) *R. v. Hughes*, 2 East, P. C. Bank Prosecutions, R. & R. C. C. 1002; *R. v. McGuire*, Id.; The 378.

single letter would be a very unnatural movement of an ordinary writer, while his off-hand movement when he is not thinking about it, will be the natural movement of the hand, and will contain the natural characteristics of the hand.

"The hand when put on and making two or three letters in succession, without taking it up, in ordinary writing, will measure off from parts of letters to the next parts of letters, until it is taken up; a sort of a gauge running like a machine sometimes larger, sometimes smaller, but having the general angles and curves; that is, a fine hand placed inside of a coarser hand, the lines will seem to be parallel; enlarge a very fine hand up to a very coarse hand, and if there is a right angle, it will remain a right angle; if there is a circle, it will still remain a circle, and everything will maintain the same parallelisms. So that take any person's ordinary writing and split through it, and lay one half under the other half, and there will be movements like parallel movements, not straight, like railroad tracks, but parallel, so that when one curves the other will curve; that is taking the same previous and following joinings."

Joseph E. Paine, an expert: "The signature 'James B. Taylor' to this document [alleged will] is characterized in the first place by a marked degree of regularity in the movements, running parallel in most instances with each other, so as to give a sort of mathematical or mechanical form; and in the second place by, in two or three instances, slow motion. It is a slowly written signature, written with great care.

"All the movements indicate a constrained motion of the hand movement, none of the movements extend beyond the use of the fingers and the wrist, in my judgment, except the flourish underneath, which might require the whole arm movement."

There were five exhibits in the case containing signatures of Mr. Taylor proved and conceded to be genuine. Mr. Paine analyzed these signatures, and stated that they contained no characteristics of the Will signature, and that the signatures to the Exhibits and the Will signature could not have been

not calling him would of course be matter of strong observation to the jury. A document wholly in the handwriting of a party is said to be an autograph written by the same person (Fol. 1763). As to Exhibit "D," December 10th, 1870, he testified :

"There is no slow motion in it, it is written as fast as the other [Exhibits], and is apparently an off-hand, natural signature; it has that appearance in my judgment. It is by no means a beautiful handwriting; there are no curves or movements that make it a graceful writing."

In regard to Exhibit "C," December 16th, 1870, he testifies, it "slightly differs from Exhibit 'D,' December 19th, 1870, but they are those slight differences that occur perpetually in all signatures, and which defy almost the subtleties of language to describe them; but they are essentially the same movements in detail."

As to Exhibit "E," December 19th, 1870, he testifies as follows: "It differs from Exhibits 'D' and 'C' in this, that the capital letters 'J,' 'B,' and 'T' are shorter than those in the other signatures. The other differences are, in my judgment, non-essential—those that are usual, and which I expect to find always in the signatures of any man."

In regard to Exhibit "B," December 16th, 1870, he testifies, it "is a very hastily made signature, and imperfect in many particulars; nevertheless the characteristics are generally the same as in the other exhibits." . . . . .

"In these Exhibits the movements seem to me to be natural, free, regular movements of the hand; taking them altogether they present the same characteristics, movement, and action, and seem to be as free and natural and easy as belongs to that hand to be (or did belong to it), differing in this respect from the signature to the will, which has a sort of mechanical expression, is not free, but has a made-up movement, slow, and looks like a copy made by a child at school.

"Q. State whether, in the signature to the will, there are any of the characteristics which exist in the signatures to the five exhibits shown you to-day?

"A. No characteristic movement in those five signatures is repeated in the signature to the will, nor anything similar to it, in my judgment; not a solitary one is to be found."

The witness's opinion that the will signature was not, and could not have been written by the same person who wrote the exhibits, is not founded on the fact that the signatures to such exhibits vary from the signature to the alleged will



or holograph; (*d*) where it is in the handwriting of another person and is only signed by the party, the signature may be called "onomastic;" where it

(*d*) 2 Benth. Jud. Ev. 459, 460, 461.

The signatures to the exhibits vary; in fact any two signatures made by the same person will contain variations. The witness testifies on the subject as follows:

"Q. I will ask you whether, in your judgment, any person ever writes his signature twice precisely alike?

"A. Never.

"I should infer from the writing that Mr. Taylor held his pen pointing rather off from the right shoulder than immediately over it or toward it; that the pen in the other case, in the case of the signature to the will, was held more pointing over the shoulder."

Mr. Paine's evidence proved two things. 1st. That the writer of the will signature held his pen differently from Mr. Taylor, and that his movements in writing were totally different; 2nd. That the will signature has not "not a solitary one" of the characteristics of Taylor's genuine signature; 3rd. That the handwriting of the will signature and the body of the will, is the same in every characteristic, and was written by the same person, and therefore the will signature could not have been written by Taylor.

Albert S. Southworth, an expert, agreed with Mr. Paine in the particulars above set forth. His analysis of the five exhibits written and signed by Taylor will be found at folios 1837 to 1851. After giving the characteristics of the signatures to the exhibits, he testified as follows: "Q. Do any of the characteristics you have spoken of in the signatures to the exhibits you have last testified about, appear in the signature to the will?

"A. Not one." Mr. Southworth's analysis of the handwriting of the pretended will and the signature, 'James B. Taylor,' will be found at folios 1798 to 1834. He, as well as Mr. Paine, demonstrated that the handwriting of the body of the will and the signature, 'James B. Taylor,' are one and the same, and must have been written by one and the same person. Mr. Paine, as already shown, pointed out some two hundred peculiarities, coincidences, and characteristics between the handwriting of the body of the will and the signature James B. Taylor. Southworth pointed out a great number of characteristics which the signature and

is signed by a cross or other symbol, "symbolic."

(e)

233. Abstractly considered, it is clear that a

(e) 2 Benth. Jud. Ev. 459, 460, 461.

the handwriting of the body of the will possess in common. This, which he said, could not be, unless they were written by the same person. Mr. Southworth testified that the signature to the will could be placed over words in the body of the will, so that it could be seen that the letters in the signature were exactly the same in every characteristic as the corresponding letters in the body of the will. He said: "This can be proved by placing the will against the sunlight, against the window; the paper is so transparent that the lines in the bottom of the word 'James' [of signature to will] can be run against the bottom of a great many words up and down the page opposite." This experiment Mr. Southworth made in court before the surrogate, and it amounted to a demonstration that the handwriting of the body of the alleged will and the signature James B. Taylor were the same. The letters in the signature which lay over corresponding letters in the body of the alleged will were the same in respect to curves, they being "parallel with each other, like two rails curved—the curve of a railroad." They were the same in respect to "all of the movements;" the witness said "the outside movements are all parallel," . . . "the strokes are all parallel."

Witness, while he had the will against the window, pointed out the coincidences and characteristics in common between various letters in the signature "James B. Taylor," and corresponding letters in the body of the alleged will. The witness testified that if each of the signatures of James B. Taylor to the exhibits was laid over the will signature, it could be seen that they would not correspond in movements, curves and characteristics.

The witness testified, that if the same experiment were performed with reference to any two of the signatures to the exhibits, it could be seen that they corresponded in their characteristics and were written by the same person. The witness said, "If this experiment were performed with the genuine signatures, they would exhibit successive curves, characteristic curves, curves belonging to that hand, connected successively, making a combination of characteristics, that they would present the same angles.

"Q. Showing that they were written by the same hand?

judgment respecting the genuineness of handwriting, based on its resemblance to or dissimilarity from that of the supposed writer, may be formed by one or

“A. Showing that the same machine made them.”

The witness testified, that if any of the genuine signatures to the exhibits were laid over the will signature, it would appear that the letters in the one had no characteristics in common with the letters of the other; that they had “no resemblance whatever, no characteristics [in common] not the slightest.” That they had not “the same turn at all,” and would not go together; that the characteristics which mark identity of handwriting were totally different.

The testimony of Southworth and of Paine shows that the genuine signatures of Taylor to exhibits in evidence, have not so much as a single characteristic in common with the alleged will signature. Their testimony also shows that every one of the characteristics of the will signature appear over and over again in the body of the alleged will. The coincidences, the characteristics in common, between the handwriting in the body of the alleged will and the signature “James B. Taylor,” are counted by hundreds.

George Stimpson, an expert, called for the respondent, said that the person who wrote the will was laboring under restraint, he “found it difficult to manage it [the pen].”

He says that: “It indicates a slow movement in making the particular letter.

“Q. Would not it indicate a slow and constrained motion of the pen?

“A. Certainly, of course.

“Q. Would not it indicate an unnatural motion of the pen, as contradistinguished from a free and natural motion of it?

“A. Why, of course, a free and natural motion would be a continuous stroke.”

He says in respect to the “a” of “James” in will signature, the pressure of pen continues the same “from the top until that stroke ends at, or near the base line.”

He says in respect to the “a” of Exhibit “D,” pen increases in pressure until it ends about two thirds of the way down, “then diminishes in pressure, and comes to the right, terminating in a hair stroke.”

Witness tried to explain by saying the signatures [to exhibits and the will] could not have been written with the same pen. “The person makes his letters apparently different.”

more of the following means :—1st, A standard of the general nature of the handwriting of the person, may be formed in the mind by having, on former occasions, He says: "The gentleman who wrote the signature [will signature] was under considerable restraint."

In reference to the difference in pen pressure between exhibit signatures and the will signature, he says: "The signature of the will appears to have been written with a different pen from what I find that he may have used in the exhibits."

He says that using a different pen would make a difference in the body strokes of the signature, with reference to the will and signatures in the exhibits." Previously this witness had said there was no difference in pen pressure.

In reference to the first body stroke of the "m," he says, if the hair-stroke stuck through it, it would show that the pen was taken off. In regard to the first body stroke of the "m" in the will signature, he says the ragged appearance is discernible about one-third of the way down. He finally admits that if a person wrote with a constrained, slow motion, the stroke would be more ragged than if he wrote without slow motion.

In regard to exhibit "D," he admits the body strokes of the "m" are unlike the body strokes of the "m" in the will signature. He thinks the exhibit signatures were written with a softer pen than the will signature. The witness is very explicit on this point, and testifies as follows:

"Q. What kind of pen do you think the will signature was written with?

"A. I say I think it was written with a stiffer pen, a pen he could not wield as easily as he could the one used when he was writing the other signature."

He thinks there was a very great difference between the pen that wrote the will signature, and the pen that wrote the exhibit signatures.

He thinks that when the will signature was written, he [the writer of the signature to the will] was laboring under a difficulty with the pen at the time when he wrote the signature to the will."

He testifies as follows:

"Q. You have no doubt about that, that the person who wrote the will signature was laboring under a difficulty in connection with the pen when he wrote that signature?

"A. I have no doubt at all.

observed the characters traced by him while in the act of writing, with which standard the handwriting in the disputed document may, by a mental operation,

“Q. And that it was not written with the natural motion and freedom of the writer?

“A. Well, it was not written with the freedom that he generally had, on account of the pen he was using; that is my estimation.”

This witness, Jackson, to the will in question, who testified that he signed his name as a witness with the same pen which the alleged testator used, admitted, in reference to the staff of “T” of will signature, that it starts with heavy pressure, and is unlike exhibit signatures in that respect. He admits that, with reference to the “T” of will signature, the descent is on the right hand side of the staff. He admits that if a person generally made a “T” with the descent on the other side of the staff, it would be an important point in determining his handwriting. He admits, also, that a person would be very likely to be uniform in this particular. Mr. Taylor, whenever he made the kind of “T” sought to be imitated in the will signature, uniformly made the staff of the “T” in a particular way, directly opposite to the way it is made in the signature to the will.

This witness says, in respect to the will signature, that the “a” in “Taylor” is better formed than the “a” in “James.” He states as follows:

“Q. A letter more perfectly formed in what respect?

“A. Well, he seems to have got a little more used to the pen—seems to be driving it along better.

“Q. State in what particular the shape is more perfect?

“A. The latter part of the second is not quite as ragged as in the first one.

“Q. It looks as if the writer wrote with more smoothness when he got to the second “a”?

“A. Yes.

“Q. As if he had a little better command of the pen?

“A. A little more used to it, the same as any one.”

The genuineness of the signature offered as a test must be distinctly proved (*Depue v. Place*, 7 Pa. St. 428). Writings submitted to a jury's inspection should be read in evidence. As a general rule, all evidence is addressed to the hearing of the jury, and not to their sight (*Outlaw v. Hurdle*, 1 Jones (N. C.) L. 150; *S. P. Otey v. Hoy*, 3 Id. 407). A comparison of the signature to a writing with other writings of the party,

be compared. 2dly, A person who has never seen the supposed writer of the document write, may obtain a like standard by means either of having carried on proved to be genuine, is, in Massachusetts, evidence to prove the signature (*Homer v. Wallis*, 11 Mass. 309; *Hall v. Huse*, 10 Id. 39; *Salem Bank v. Gloucester Bank*, 17 Id. 1; *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Richardson v. Newcomb*, 21 Id. 315; and so in Iowa; *Baker v. Mygatt*, 14 Iowa, 131). Where the prosecutor in a criminal case, pending, procured the defendant to write in his presence, to become acquainted with his handwriting, *held*, that such prosecutor's testimony, as to the defendant's writing, thus obtained, was admissible at the trial (*Reid v. State*, 20 Ga. 681). Evidence of other writings proved by witnesses and also of witnesses, is admissible to show that the peculiarities of an alteration are such as the party frequently used in a person's ordinary handwriting (*Smith v. Fenner*, 1 Gall. 170). Deeds cannot be proved by comparison of handwriting of the grantor and of the witnesses; but the signature of the justice taking the acknowledgment may be so (*Welch v. Gould*, 2 Root (Conn.) 287; and see *Moore v. Andrews*, 5 Port. (Ala.) 107; *Stewart v. Connor*, 9 Ala. 803; *Union Bank v. Knapp*, 3 Pick. 96; *North Bank v. Abbott*, 13 Id. 465; *Welsh v. Barrett*, 15 Mass. 380; *Washington Bank v. Prescott*, 20 Pick. 339; *Shore v. Wiley*, 18 Id. 558; *Love v. Payton*, 1 Overt (Tenn.) 225; *Hay v. Kramer*, 2 Watts & S. 137; *Alter v. Berghaus*, 8 Watts, 77, *Holmes v. All*, 1 Mo. 419; *Brown v. Lincoln*, 47 N. H. 468; *Randolph v. Loughlin*, 48 N. Y. 456; *Medway v. United States*, 6 Ct. of Cl. 421; *Bragg v. Coldwell*, 19 Ohio St. 407; *Clayton v. Siebert*, 3 Brews. (Pa.) 176). While the American decisions are far from uniform with respect to the admission of papers irrelevant to the record, for the sole purpose of affording a standard of comparison of handwriting, yet the weight of authority is against such a practice, especially when the genuineness of the standard introduced may itself come in question (*Clark v. Rhodes*, 2 Heisk. (Tenn.) 206; and see the *Parish Will Case*, 5 vol. Edition; *Commissioners v. Hanion*, 1 Nott & Mc. (S. C.) 554; *Clark v. Freeman*, 25 Pa. St. 133; *Taylor v. Sutherland*, 24 Id. 333; *Cabarga v. Seeger*, 17 Id. 514; *Magee v. Osborne*, 32 N. Y. 669; *Dubois v. Baker*, 30 Id. 355; *Kelly v. Paul*, 3 Gratt. 191; *Shepherd v. Frys*, Id. 442; *United States v. Keen*, 1 McLean, 429; *James v. Wharton*, 3 Id. 492; *State Bank v. Whitelow*, 6 Ala. 135; *McCaskle v. Amarine*, 12 Id. 19; *Hopper v. Ashley*, 15 Id.

written correspondence with him, or having had other opportunities of observing writing, which there was reasonable ground for presuming to be his. 3dly, 457; *Strong v. Bower*, 17 Id. 706; *Robinson v. Johnson*, 1 Mo. 233; *Kenney v. Flynn*, 2 R. I. 319; *Chandler v. Le Barron*, 45 Me. 524; *Martin v. Maguire*, 7 Gray (Mass.) 177). Impressions of writings, taken by means of a press, and duplicates made by a copying machine, are not originals, and cannot be used as standards of comparison (*Commonwealth v. Eastman*, 1 Bush. (Mass.) 189). After competent evidence has been introduced to prove handwriting, it may be corroborated by comparison with other writings concerning which there is no question (*Baker v. Haines*, 6 Whart. (Pa.) 284; *Clark v. Wyatt*, 15 Ind. 271; *Myers v. Toscan*, 3 N. H. 47; *Bank of Lancaster v. Whitehill*, 10 Serg. & R. (Pa.) 110; *Bank of Pennsylvania v. Halderman*, 1 Pa. 161; *Travis v. Brown*, 43 Pa. St. 9; *Haycock v. Greup*, 57 Id. 438; *Boman v. Plunkett*, 2 McCord (S. C.) 518; *Robertson v. Miller*, 1 McMull (S. C.) 120). Although handwriting cannot be proved by comparison of hands, yet when different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and genuineness or simulation of the handwriting in question be inferred by such comparison (*Ellis v. People*, 21 How. (N. Y.) Pr. 356; *Henderson v. Hackney*, 16 Ga. 521; *Williams v. Drexel*, 14 Md. 56; *Rogers v. Shaler*, Anth. (N. Y.) 109; *Van Wyck v. McIntosh*, 14 N. Y. (4 Kern.) 439; *Dubois v. Baker*, 40 Barb. (N. Y.) 556). But consult *Little v. Beazly*, 2 Ala. 703; *State v. Givens*, 5 Ala. 747; *Bishop v. State*, 30 Ala. 34; *Jumpertz v. People*, 21 Ill. 375; *Kernin v. Hill*, 37 Ill. 209; *Shank v. Butsch*, 28 Ind. 19; *McAllister v. McAllister*, 7 B. Mon. (Ky.) 269; *Hawkins v. Grimes*, 13 Id. 258; *Woodward v. Spiller*, 1 Dana (Ky.) 179; *Jackson v. Phillips*, 9 Cow. (N. Y.) 94; *People v. Spooner*, 1 Den. (N. Y.) 343; *Hanley v. Gandy*, 28 Tex. 211; *Pierce v. Northey*, 14 Wis. 9; *Taylor v. Crowningshield*, 5 N. Y. Legal Observer, 209.

A writer in *Appleton's Journal*, New York, October 2d, 1869, refers to a curious case occurring in France where a testator bequeathed to his two nephews "a chacun deux mille cent francs." Between the d and the eux, a minute mark occurred, which, if made by the pen, would cause the bequest to read "a chacun d'eux mille cent francs," to each one of them one hundred thousand francs, whereas if, as the legatees claimed, the mark was not made by the pen of the writer, but

A judgment as to the genuineness of the handwriting to a document, may be formed by a comparison instituted between it and other documents, known or admitted to be in the handwriting of the party. These three modes of proof—the admissibility and weight of which we propose to consider in their order—have been accurately designated respectively, “*Præsumptio ex visu scriptionis* ;” “*Præsumptio ex scriptis olim, visis* ;” and “*Præsumptio ex comparatione scriptorum*,” or “*Ex scripto nunc viso*.” (*f*)

234. The rule with respect to proof “*ex visu scriptionis*” is clear and settled ; namely, that any person who has ever seen the supposed writer of a document write, so as to have thereby acquired a standard in his own mind, of the general character of the handwriting of that party, is a competent witness to say whether he believes the handwriting of the disputed document to be genuine or not. (*g*) The having seen the party write but once, (*h*) no matter how long ago, (*i*) or having seen him merely write his signature, (*k*) or even only his surname, (*l*) is sufficient to render the evidence admissible: the weakness of it is matter of comment for the jury. Where a person who cannot write is desirous of subscribing his name to a document, another person writes it for him, which signa-

(*f*) 3 Benth. Jud. Ev. 598, 599.

(*i*) *R. v. Horne Tooke*, 25 Ho. St.

(*g*) *De la Motte's Case*, 21 Ho. St. Tr. 810; *Eagleton v. Kingston*, 8 Ves. 473; 474; *Lewis v. Sapio*, 1 M. & M. 39; *Willman v. Worrall*, 8 C. & P. 380; also *Garrells v. Alexander*, 4 Esp. 37.

Tr. 71, 72; *Eagleton v. Kingston*, 8 Ves. 474, per Lord Eldon.

(*k*) *Garrells v. Alexander*, 4 Esp. 37; *Willman v. Worrall*, 8 C. & P. 380.

(*l*) *Willman v. Worrall*, 8 C. & P. 380; *Phill. & Am. Ev.* 692. See also *Warren v. Anderson*, 8 Scott, 384.

(*l*) *Lewis v. Sapio*, 1 M. & M. 39; overruling *Powell v. Ford*, 2 Stark. 164.

was a mere accidental fly-speck or defect in the paper, the bequest became “*a chacun deux mille cent francs*,” to each one two hundred thousand francs.



ture he identifies by affixing over or near it a mark, usually a cross. Here it is obvious the difficulty of proof is much increased. "In the symbolic mode of signature," observes Bentham, (*m*) "whatever security is afforded by the two other modes (viz., against spuriousness *pro parte* as well as in *toto* by the holographic, against spuriousness in *toto* by the onomastic) is manifestly wanting: a cross (the usual mark) made by one man, not being distinguishable from a cross made by another, the real part of evidence has no place. Recognition, viz., by deportment, is the only way in which this mode of authentication can be said to operate." This is rather too broadly stated. Unless there is something to identify the mark as being that of a particular person, the evidence seems not to be admissible; but otherwise it is impossible to distinguish this in principle from any other form of proof *ex visu scriptionis*. In one case, (*n*) in order to prove the indorsement of a bill of exchange by one A. M., which was indorsed by mark, a witness was called, who stated that he had frequently seen A. M. make her mark and so sign instruments, and he pointed out some peculiarity. Tindal, C. J., after some hesitation, admitted the evidence as sufficient, and the plaintiff had a verdict. In a court of equity also, where it was sought to prove a debt due by a deceased person to one W. P., and, to prevent the debt from being barred by the statute of limitations, receipts for interest were produced in the handwriting of the deceased, and signed with the christian and surname of W. P., having a cross between them; and an affidavit was produced that P. was a marksman, and that the signs or marks on those documents were respectively the

(*m*) 2 Benth. Jud. Ev. 461.

516. See per Parke, B. in *Sayer v.*

(*n*) *George v. Surrey*, 1 M. & M. Glossop, 12 Jur. 465.

mark or sign of W. P. used by him in place of signing his name; Shadwell, V. C., thought the proof of the signature sufficient. (*o*)

235. The practice with reference to the presumption "*ex scriptis olim visis*" is thus clearly stated by Patteson, J., in the case of *Doe d. Mudd v. Suchermore*: (*p*) "That knowledge" (*scil.* of handwriting) "may have been acquired, by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them, by written answers producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party, evidence of the identity of the party being of course added aliunde, if the witness be not personally acquainted with him." The number of papers, however, which the witness may have seen in the handwriting of the party is perfectly immaterial, so far as relates to the admissibility of the evidence. (*q*) Nor is it absolutely necessary for this purpose, that any act should be done or

(*o*) *Pearcy v. Dicker*, 13 Jur. 997. See also *Baker v. Dening*, 8 A. & E. 94; In the Goods of *Bryce*. 2 Curt. 325.

(*p*) 5 A. & E. 703, 730. See also *Lord Ferrers v. Shirley*, Fitzg. 195; *Cary v. Pitt*, Peake's Ev. App. xxxiv.; *Tharpe v. Gisburne*, 2 C. & P. 21; *R. v. Slaney*, 5 C. & P. 213; *Harrington*

*v. Fry*, R. & M. 90; *Layer's Case*, 16 Ho. St. Tr. 205; *Gould v. Jones*, 1 W. Blackst. 384; *Middleton v. Sandford*, 4 Camp. 34; *Parkins v. Hawkshaw*, 2 Stark. 239; *Greenshields v. Crawford*, 9 M. & W. 314; *Batchelor v. Honeywood*, 2 Esp. 714; *Murieta v. Wolfhagen*, 2 Car. & K. 744.

(*q*) *Phil. & Am. Ev.* 693.

business transacted by the witness in consequence of the correspondence. (*r*) "The clerk," says Lord Denman, in *Doe d. Mudd v. Suckermore*, (*s*) "who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others, has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me."

236. It seems, however, that, in order to render admissible either of the above modes of proof of handwriting, the knowledge must not have been acquired or communicated with a view to the specific occasion on which the proof is offered. (*t*) In a case where the question turned on the genuineness of the handwriting on a bill of exchange, purporting to have been accepted by the defendant, the evidence of a witness, who stated that he had seen the defendant write his name several times before the trial,—he having written it for the purpose of showing to the witness his true manner of writing it, so that the witness might be able to distinguish it from the pretended acceptance to the bill,—was rejected by Lord Kenyon,\* as the defendant might, through design, have written differently from his common mode of writing his name. (*u*) So where, on an indictment for sending a threatening letter, the only witness called to prove that the letter was in the handwriting of the accused, was a policeman who, after the letter had been received and suspicions

(*r*) *Id.*; 2 Stark. Ev. 544, u. (m), and Coleridge, JJ., in *Doe d. Mudd v. Suckermore*, 5 A. & Ell. 703.

(*s*) 5 A. & E. 703, 740.

(*u*) *Stanger v. Searle*, 1 Esp. 14.

(*t*) See the judgments of Patteson

aroused, was sent by his inspector to the accused to pay him some money and procure a receipt, in order thus to obtain a knowledge of his handwriting by seeing him write; his evidence was rejected by Maule, J., on the ground, that "knowledge obtained for such a specific purpose and under such a bias, is not such as to make a man admissible as a quasi expert witness." (*x*)

**237.** It has been made a question, whether a witness who, either *ex visu* *scriptionis* or *ex scriptis olim visis*, has acquired a knowledge of the handwriting of a party, but which, from length of time, has partly faded from his memory, may be allowed, during examination, to refresh his memory by reference to papers or memoranda proved to be in the handwriting of the party. In one case a witness was allowed to do so by Dallas, C. J., at *Nisi Prius*; (*y*) but the correctness of that decision was denied by Patteson, J., in *Doe d. Mudd v. Suckermore*; (*z*) and the propriety of the practice may fairly be questioned.

**238.** We now proceed to the third part of this subject, namely, whether and under what circumstances it is competent to prove the handwriting of a party to a document, by a comparison or collation instituted between it and other documents proved or assumed to be in his handwriting. By the general rule of the common law, such evidence was not receivable (*a*)—for which three reasons are assigned in our books. First, That the writings offered for the

(*x*) *R. v. Crouch*, 4 Cox, Cr. Cas. 163.

(*y*) *Burr v. Harper*, Holt, N. P. C. 420.

(*z*) 5 A. & E. 703, 737.

(*a*) *Doe d. Mudd v. Suckermore*, 5 A. & E. 703; *Stanger v. Searle*, 1 Esp.

14; *Greaves v. Hunter*, 2 C. & P. 477; *Macferson v. Thoytes*, 1 Peake, 20; *Brookbard v. Woodley*, Id. ii. (a); *R. v. Cator*, 4 Esp. 117; *De la Motte's Case*, 21 Ho. St. Tr. 810; *Francia's Case*, 15 Id. 923.

purpose of comparison with the document in question might be spurious; and, consequently, that, before any comparison between them and it could be instituted, a collateral issue must be tried, to determine their genuineness. Nor is this all—if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones; and so the inquiry might go on *ad infinitum*, to the great distraction of the attention of the jury, and delay in the administration of justice. (*b*) Secondly, That the specimens might not be fairly selected. (*c*) Thirdly, That the persons composing the jury might be unable to read, and, consequently, be unable to institute such a comparison. (*d*) As to the last of these objections, it does not seem satisfactory logic, to prohibit a jury which can read, from availing themselves of that means for the investigation of truth, because other juries might, from want of education, be disqualified from so doing;—if some men are blind, that is no reason why all others should have their eyes put out. Nor is the second objection very formidable—it is not always easy to obtain unfair specimens; and should such be produced, it would be competent to the opposite party to encounter them with true ones. But there certainly was great weight in the first objection, particularly when taken in connection with the general rules of common-law practice. So long as parties to a suit were allowed to mask their evidence till the

(*b*) Per Coleridge, J., in *Doe d. Mudd v. Suckermore*, 5 A. & E. 706, 707; 2 Stark. Ev. 516, 3rd ed.; R. v. Sleight, Surrey Sum. Ass. 1851, per Alderson, B., MS.

(*c*) *Id.*; and per Dallas, C. J., in *Burr v. Harper*, Holt, N. P. C. 420.

(*d*) Per Lord Kenyon, C. J., in *Macferson v. Thoytes*, 1 Peake, 20; per Dallas, C. J., in *Burr v. Harper*, Holt, N. P. C. 420; per Yates, J., in *Brookbard v. Woodley*, 1 Peake, 20 n. (a); per Lord Eldon, C., in *Eagleton v. Kingston*, 8 Ves. 475.

very moment of trial, so long would it have been highly dangerous to permit either of them to adduce *ad libitum*, for the purpose of comparison, a number of supposed specimens of handwriting, which the opposite party, having had no previous notice of the intention to adduce, would not be in a condition either to answer or contradict—specimens which might not be fairly selected, or even be the handwriting of the party to whom they are attributed. Still the exclusion of the proof of handwriting by comparison, was not satisfactory. (*e*) And if any practical means could be devised to secure at least the genuineness of the specimens, it ought on every principle to be received : and the legislature in modern times has accordingly taken the matter in hand, as will be shown presently. (*f*)

**239.** There are several common-law exceptions to the rule which excludes proof of handwriting by comparison : the first of which is, that it is competent for the court and jury to compare the handwriting of a disputed document, with any others which are in evidence in the cause, and which are admitted or proved to be in the handwriting of the supposed writer. (*g*) The ground of this exception is sometimes said to be, that the documents being already before the jury, to prevent their mentally instituting such comparison would be impossible ; (*h*) but another and better reason is, that this sort of proof is not open to the dangers to which the comparison of hands is ex-

(*e*) 2 Ev. Poth. 185 ; 2 Stark. Ev. 516, 3rd ed. · Phill. & Am. Ev. 698.

(*f*) See 17 & 18 Vict. 125, ss. 27 and 103, and 28 Vict. c. 18, ss. 8 and 1, *infra*.

(*g*) Griffith *v.* Williams, 1 C. & J. 47 ; Doe *d.* Perry *v.* Newton, 5 A. &

E. 514 ; Solita *v.* Yarrow, 1 M. & Rob. 133 ; R. *v.* Morgan, 1d. 134, u. ; Allport *v.* Meek, 4 C. & P. 267 ; Bromage *v.* Rice, 7 C. & P. 548 ; R. *v.* Sleigh, Surrey Sum. Ass. 1851, per Alderson, B., MS.

(*h*) Doe *d.* Perry *v.* Newton, 5 A. & E. 514.

posed—namely, the raising collateral issues, and the jury being misled by spurious specimens.

240. Another exception is the case of ancient documents. When a document is of such a date, that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write, or by having held correspondence with him, the law, acting on the maxim, “*Lex non cogit impossibilia*,” (*i*) allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one. (*j*) It is not easy to determine the precise degree of antiquity which is sufficient to let in evidence of this nature. In *Roe d. Brune v. Rawlings*, (*k*) the supposed writer had been dead about sixty years; in *Doe d. Tilman v. Tarver*, (*l*) the writing was nearly one hundred years old; and in *Doe d. Jenkins v. Davies* (*m*) it was eighty-four years old. And how this comparison is to be made is not clearly settled. In Buller’s *Nisi Prius* (*n*) a case is referred to, decided by Lord Hardwicke in December, 1746, where a parson’s book was produced to prove a modus. The parson having been long dead, a witness who had examined the parish books, in which was the same parson’s name, was permitted to swear to the similitude of the handwriting, &c. In the case of *Sparrow v. Farrant*, (*o*) Holroyd, J., is reported to have said that, in order to make ancient signatures available for this purpose, a witness should be produced who is able to swear, from his having ex-

(*i*) Hob. 96.

(*k*) 7 East, 282, note (a).

(*j*) Phill. & Am. Ev. 701; 2 Stark. Ev. 516, 517, 3rd ed.; B. N. P. 236; *Roe d. Brune v. Rawlings*, 7 East, 282 n. (a); *Doe d. Tilman v. Tarver*, R. & M. 141; *Doe d. Mudd v. Suckernore*, 5 A. & E. 703; *Doe d. Jenkins v. Davies*, 10 Q. B. 314.

(*l*) R. & M. 141.

(*m*) 10 Q. B. 314.

(*n*) B. N. P. 236.

(*o*) 2 Stark. Ev. 517 n (e), 3rd ed.; Devon Sp. Ass. 1819.

amined several of such signatures, that he has acquired a sufficient knowledge of the handwriting to be able, without an actual comparison, to state his belief on the subject. Subsequent to this, however, came the case of *Doe d. Tilman v. Tarver*, (p) which was an action of ejectment, tried in 1824, where, in order to prove that a place called Yard Farm was part of a certain manor, a paper was put in evidence, which had been handed over to the present steward, amongst other papers and books relating to the manor, by the representatives of the late steward, entitled, "An account of E. H." (who appeared by the books and rolls belonging to the manor to have been steward), "receiver of the Isle of Wight estates of the Lady F., for two years ending at Michaelmas, 1727," and which contained an entry relative to Yard Farm. In order to prove the handwriting of E. H., "Lord Chief Justice Abbott," says the report, "directed the person producing the paper to compare it with the handwriting of E. H. in other papers belonging to the manor, and to say upon oath whether he believed the writings were by the same person;" adding that this course had once been adopted by Lawrence, J. The observation of Lord Denman on this and some other cases, in *Doe d. Mudd v. Suckermore*, (q) that it does not distinctly appear from the reports, whether the comparison was made with a standard, formed in the mind of the witness by an inspection of the papers produced, or whether a direct comparison was made in the first instance, seems well founded: and no objection as to the mode of putting the question appears to have been raised by the counsel on either side. It is probable also, that the witness examined in the case before Law-

(p) R. &amp; M. 141.

(q) 5 A. &amp; E. 703, 748.



rence, J., was a scientific witness, or expert,—the report speaks of him as being accidentally in court at the time.

241. In this state of the authorities, the case of the Fitzwalter peerage (*r*) came before the committee of privileges of the House of Lords; and we shall state this case somewhat at length, it being one of the most important on the subject of handwriting in general, as well as bearing strongly on the point under consideration. It was a claim to a peerage which had fallen into abeyance in 1756, and the petition was heard in May, 1843. The claimant, in order to prove his case, proposed to put in evidence some family pedigrees, which were produced from the proper custody. They purported to have been made by E. F., who died in 1751. He had stood in the direct line of the claimant's ancestors; so that if those pedigrees could be proved to be of the handwriting of E. F., they would be admissible in evidence for the claimant, as declarations made by a deceased relative, of circumstances respecting the state of his family and immediate relatives. It was proposed to prove the handwriting of E. F., by producing from the Prerogative Office his will, which had been already received in evidence for other purposes, and four other documents, which were proved to be of his handwriting; namely, a confidential letter written by him to the steward of his manor; another letter by him, appointing a gamekeeper within that manor; a memorandum in an account book; and a deed of settlement of property comprised within that manor. These were produced from a closet which contained the claimant's family muniments, including the title deeds of the manor and property, which then belonged to him in right of his grandmother. It was proved

that the deed of settlement had been repeatedly, and very recently, acted upon, and that all the documents had the genuine signature of "E. F." It was next proposed to prove the identity of the signer of those documents with the writer of the pedigrees, by comparison of the handwriting of the latter with the signatures to the proved documents; and for this purpose the inspector of franks in the General Post Office, who had had much experience in distinguishing the characters of handwriting, was called. "Being asked," says the report, "if he had examined the signature of E. F., to three of the documents, the deed, the will, and the appointment of gamekeeper, all of which were produced to him, he said he had examined the signature to the will in the Prerogative Office twice, and looked four or five times at the signatures to the letter and other documents of E. F., and to the handwriting of the entries in the account book, and of queries on the pedigree of the family at the office of the claimant's solicitor; and he considered that, by the inspections he had made, he was so familiar with the handwriting of the person by whom these documents were written or signed, that, without any immediate comparison with them, he should be able to say whether any other document produced was, or was not in the handwriting of the same person. He believed all these documents to have been signed by the same person; and he did not form his opinion merely from the signatures, but more from the general similarity of the letters, which he said were written in a remarkable character." This evidence was objected to by the Attorney-General, on the ground that the witness's knowledge of the handwriting was acquired, not in the ordinary course of business, but from having studied the handwriting for

the purpose of speaking to the identity of the writer. In support of the evidence several cases were cited by the claimant's counsel, and among others *Doe d. Tilman v. Tarver*, and *Sparrow v. Farrant*; to which it was replied, that the Court of Queen's Bench had become more strict in its practice since those cases, most of which were cases at nisi prius or on the circuits. The pedigree was rejected by the committee as evidence; and Lord Brougham added, that about five years before, the Lord Chief Justice of the Queen's Bench had consulted him on that kind of evidence and their joint impression was that if *Doe d. Tilman v. Tarver* and *Sparrow v. Farrant* were correctly reported, they had gone further than the rule was ever carried. "In the present case," he added, "the Lord Chancellor (Lyndhurst) and himself were clearly of opinion, that they ought not to allow a person to say from inspection of the signatures to two or three documents—two only, the deed and will, being genuine instruments, admitted to be in the handwriting of E. F.,—from the inspection of those two documents, that he could prove the handwriting of the party. No doubt such evidence had been often received because it was not objected to. A witness was properly allowed to speak to a person's handwriting, from inspection of a number of documents with which he had grown familiar from frequent use of them; and it was on that ground that a person's solicitor and steward were admitted to prove his handwriting." The claimant's counsel having then referred to *Goodtitle d. Revet v. Braham* (*s*) in which an inspector of franks at the Post Office was admitted, to say as a matter of skill and judgment, whether the name signed to a will was genuine or in a feigned hand, Lord Brougham

continued, "Yes, truly; for that is matter of professional skill. But that is no reason for admitting a witness to speak to the real handwriting of a person, from only having seen a few of his signatures to other instruments produced to him, and that for the purpose of proving its identity." A person was then called who said he had been the family solicitor of the claimant for more than thirty years, and prior to that had been clerk to his uncle, who was the family solicitor for forty years; and who, in answer to questions put to him, said that he had acquired a knowledge of the character of the handwriting of E. F., from his acquaintance with a great number of title deeds, account books, and other instruments, purporting to have been written or signed by him, which he had occasion to examine from time to time in the course of business for his client, who then held the F. estates. This witness was admitted to prove the handwriting of the pedigree; and he said he believed, and felt no doubt whatever, that the whole of it was in the handwriting of E. F., with the exception of a few words near the bottom, which he pointed out.

242. Since the case of the Fitzwalter peerage, the case of *Doe d. Jenkins v. Davies* (†) was decided by the Court of Queen's Bench. At the trial of the cause in 1845, the parish clerk of a parish at Bristol produced the register of that parish for 1761, which contained an entry of a marriage exactly corresponding with a certificate produced, dated 1761, both purporting to be signed by "W. D.," curate. The witness stated that he had been clerk for seven years and a half, and during that time had acquired a knowledge of the handwriting of W. D. from various signatures in the register; and that he believed the signatures to the

(†) 10 Q. B. 314.

entry in question in the register, and to the certificate, to be in the handwriting of W. D. This evidence was received by Coltman, J., as proof of the curate's handwriting, and his ruling was affirmed by the court.

243. Considerable difference of opinion, however, prevailed on the question, whether it was allowable to prove the handwriting of modern documents, by the testimony of witnesses, whose judgment as to the character of the handwriting, had been formed from specimens admitted to be genuine, and shown to them with a view of enabling them to form such opinion. In *Stanger v. Searle*, (*u*) where the question turned on the genuineness of the handwriting on a bill of exchange, purporting to have been accepted by the defendant, Lord Kenyon refused to allow a witness, an inspector of franks, to compare the disputed handwriting with that on other bills accepted by the defendant, and proved to be in his handwriting; though, in the subsequent case of *Allesbrook v. Roach*, (*x*) the same judge allowed the jury to compare a suspected signature with others admitted to be authentic. In a more recent case of *Clermont v. Tullidge*, (*y*) a witness for the plaintiff stated, that he was in the habit of writing letters for the plaintiff; and he admitted that one put into his hand was written by him by the direction of the plaintiff, and signed by her. The defendant's counsel then put another letter into his hand, which he said was not written by him, and that he did not believe it was written or signed by the plaintiff. Another witness having been called for the plaintiff, Lord Tenterden held that the defendant's counsel could not show him both letters, and ask whether in his belief they were not both in the same handwriting.

(*u*) 1 Esp. 14.

(*y*) 4 Car. & P. 1.

(*x*) 1 Esp. 351.

The whole subject afterwards underwent a complete investigation in the case of *Doe d. Mudd v. Suckermore*, (z) in which the rules of evidence respecting handwriting were much discussed. In that case the question turned on the due execution of a will, and the three attesting witnesses were called. It was supposed that one of them, S., was deceived in swearing to his own attestation; and that, although he had attested a will for the testator, the document produced was not that will, but a forgery, and that the attestation was in truth a counterfeit. Upon his cross-examination, two signatures, purporting to be his, and to have been subscribed to depositions made by him in proceedings relating to the same will in another court, but not produced on the present occasion, and also sixteen or eighteen signatures, apparently his, were shown to him, and he said he believed they were all in his handwriting. The cause having been adjourned, on a subsequent day another witness was called by the other side,—an inspector at the Bank, professing to have knowledge and skill in handwriting,—who deposed that he had, during the progress of the trial, made an examination of the signatures admitted by S., and had by that means, and that means only, acquired such a knowledge of the character of his handwriting, as enabled him to speak to the genuineness of the attestation on the supposed will. This evidence was objected to as being proof of handwriting by comparison; and as such it was rejected by Vaughan, J.; but the judges of the Court of Queen's Bench, after hearing the question fully argued on a rule for a new trial, differed in opinion. Lord Denman, C. J., and Williams, J., thought the evidence receivable, and argued as follows:—Admitting

(z) 5 A. &amp; E. 703.

the existence of the rule which excluded proof of handwriting by comparison—concerning the abstract propriety of which much doubt might exist—the present case did not fall strictly within it; and a rule so objectionable in itself ought not to be extended by construction or inference. No difference in principle existed, between the present case and those of *Smith v. Sainsbury*, (*a*) *Earl Ferrers v. Shirley*, (*b*) and others, where witnesses were allowed to form their opinion of handwriting from correspondence, or from having casually seen the handwriting of the party. The witness here appeared, not in the light of an ordinary person, called on to place the doubtful papers in juxtaposition, and so compare them, but of a scientific individual, called on to give to the jury the benefit of his skill; in which case *Burr v. Harper*, (*c*) and the numerous cases relative to the proof of ancient documents, showed that the recency of the period when his knowledge of the handwriting was acquired could make no difference. But even supposing this evidence were to be considered equivalent to a comparison of handwriting, still the reasons for objecting to it as such would not apply in the present case; for, the documents having been admitted by the first witness to be of his handwriting, no collateral issue could be raised upon them; which distinguished the case from that of *Stanger v. Searle*, (*d*) and brought it within that of *Allesbrook v. Roach*, (*e*) *Patteson and Coleridge, JJ.*, on the other hand, thought the evidence rightly rejected. It differed from the knowledge of handwriting obtained by correspondence, &c., in this essential point, namely, the

(*a*) 5 C. & P. 196.

(*b*) Fitzg. 195.

(*c*) Holt, N. P. C. 420.

(*d*) 1 Esp. 14.

(*e*) Id. 351.

undesignedness of the manner in which, in the latter cases, the knowledge is obtained. In such cases, the letters from which the opinion of the witness is formed, are letters written in the course of business, &c., without reference to their serving as evidence for a collateral purpose in future proceedings. It was admitted, in argument at the bar, to have been the uniform practice for many years to reject such evidence as this; and rightly so, for it was in substance proof of handwriting by comparison; and, with respect to the fact of the first witness having admitted the genuineness of the specimens, it would be dangerous to allow parties to the suit to be bound by admissions of that nature. As to *Allesbrook v. Roach*, (*f*) it must be considered as overruled by *Doe d. Perry v. Newton*; (*g*) and with respect to *Burr v. Harper*, (*h*) the legality of that decision was at least questionable; but it was never brought under review, the verdict having been against the party in whose favor it was given. They considered *Stanger v. Searle* (*i*) and *Clermont v. Tullidge* (*k*) as authorities in point. The court being thus equally divided in opinion, the rule for a new trial was of course discharged. The decision in the *Fitzwalter* peerage case, already referred to, (*l*) seems to support the view of the two judges who, in *Doe d. Mudd v. Suckermore*, were for rejecting this kind of evidence.

244. It was also made a question whether, when a witness had deposed to his belief respecting the genuineness or otherwise of handwriting, it was competent to test his knowledge and credit, by showing him other documents, not admissible as evidence

(*f*) 1 Esp. 351.

(*g*) 5 A. & E. 514.

(*h*) Holt, N. P. C. 420

(*i*) 1 Esp. 14.

(*k*) 4 C. & P. 1.

(*l*) See *ante*, § 241.



in the cause, nor proved to be genuine, and asking him whether they were in the same handwriting as the disputed one. (*m*)

245. The difficulties attending the admission of proof of handwriting by comparison on the one hand, and its exclusion on the other, have been already noticed. (*n*) The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, introduced as a remedy the following middle course in civil cases. Sect. 27 enacts, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." By sect. 103, this enactment applies to every court of civil jurisdiction; and the 28 Vict. c. 18, ss. 1, 8, extends its provisions to criminal cases.

246. In order to disprove handwriting, evidence has frequently been adduced of persons who have made it their study, and who, though unacquainted with that of the supposed writer, undertake, from their general knowledge of the subject, to say whether a given piece of handwriting is in a feigned hand or not. Much difference of opinion has prevailed relative to the admissibility of this sort of evidence. It was received by Lord Kenyon and the Court of Queen's Bench, on a trial at bar, in *Goodtitle d. Revett v. Braham*; (*o*) but rejected by the same judge in *Cary v. Pitt*, (*p*) on the ground that, although he had in the former case received the evidence, he had laid no stress upon it in his address to

(*m*) See *Hughes v. Rogers*, 8 M. & W. 123; *Griffits v. Ivery*, 11 A. & E. 322; *Young v. Honner*, 2 Moo. & R. 536.

(*n*) *Supra*, § 238.

(*o*) 4 T. R. 497.

(*p*) *Peake's Ev. App.* xxxiv.

the jury. Similar evidence, however, was afterwards admitted by Hotham, B., in *R. v. Cator*; (q) and it has also been received in the ecclesiastical courts. (r) But the principal case on the subject is that of *Gurney v. Langlands*, (s) which was an issue directed to try the genuineness of the handwriting to a warrant of attorney, and where an inspector of franks was called as a witness, and asked, "From your knowledge of handwriting, do you believe the handwriting in question to be a genuine signature, or an imitation?" This was rejected by Wood, B.; and, on a motion for a new trial, Chief Justice Abbott said, "I have long been of opinion, that evidence of this description, whether in strictness of law receivable or not, ought, if received, to have no great weight given to it. . . . The other evidence in this case was of so cogent a description, as to have produced a verdict satisfactory to the judge, who tried the cause; and I can pronounce my judgment much more to my own satisfaction upon a verdict so found, than if this evidence had been admitted, and had produced a contrary verdict. For I think it much too loose to be the foundation of a judicial decision, either by judges or juries." And Holroyd, J., said "I have great doubt whether this is legal evidence; but I am perfectly clear that it is, if received, entitled to no weight." Bayley and Best, JJ., concurring, the rule was refused. A somewhat similar notion seems to have found its way to Doctors' Commons, where Sir J. Nicholl is reported to have declined the offer of a glass of high power, used by professional witnesses of this kind, to examine the handwriting and see if the letters were what is commonly termed painted; add-

(q) 4 Esp. 117.

(r) *Saph v. Atkinson*, 1 Add. Eccl.R. 216; *Beaumont v. Perkins*, 1 Phil  
lim. 78.

(s) 5 B. &amp; A. 330.

ing that, in his opinion, the fact of their being painted, was in itself an extremely trivial circumstance. (*t*) This is carrying matters a great way, and further than is usual in courts of common law, which never reject the artificial aid of glasses or lamps, where they can be of assistance in the investigation of truth. That scientific evidence of the nature in question may, in the language of C. J. Abbott, "be much too loose to be the foundation of a judicial decision," may be perfectly true; but to declare it inadmissible as an adminiculum of testimony is rather a strong position. Indeed, its admissibility seems to be recognized in the more recent cases of the Fitzwalter peerage, (*u*) the Tracy peerage, (*x*) and *Newtown v. Ricketts*; (*y*) and, according to the present practice, it is generally received without objection. The Tracy peerage case also shows, that the evidence of persons whose occupation makes them conversant with MSS. of different ages, is receivable to prove that a given piece of handwriting is of a particular date.

247. Whatever may be the relative values, of the several modes of proving handwriting which have been discussed in this chapter, when compared with each other, it is certain that all such proof is even in its best form precarious, and often extremely dangerous. (*z*) "On a forgotten matter we can hardly make distinction of our hands." (*a*) "Many persons," it has been well remarked, "write alike; having the same teacher, writing in the same office, being of the same

(*t*) *Robson v. Rocke*, 2 Add. E. R. 88, 89. See also *Constable v. Steibel*, Hagg. N. R. 61, 62; and *In the Jods of Oppenheim*, 17 Jur. 306.

(*u*) 10 Cl. & F. 198.

(*x*) *Id.* 154.

(*y*) 9 H. L. Ca. 262.

(*z*) Huberus, Præl. Jur. Civ. lib. 22, tit. 4, n. 16; Wills, Circ. Ev. 111, 3rd ed; and see the judgment of Sir J. Nicholl, in *Robson v. Rocke*, 2 Add. Eccl. Rep. 79.

(*a*) Twelfth Night, Act 2, Scene 3

family, all these produce similitude in handwriting, which in common cases, and by common observers, is not liable to be distinguished. The handwriting of the same person varies at different periods of life : it is affected by age, by infirmity, by habit." (b) The two following instances show the deceptive nature of this kind of evidence. The first is related by Lord Eldon, in the case of *Eagleton v. Kingston*. (c) A deed was produced at a trial, purporting to be attested by two witnesses, one of whom was Lord Eldon. The genuineness of the document was strongly attacked ; but the solicitor for the party setting it up, who was a most respectable man, had every confidence in the attesting witnesses, and had in particular compared the signature of Lord Eldon to the document, with that of pleadings signed by him. Lord Eldon, however, had never attested a deed in his life. The other case occurred in Scotland, where, on a trial for the forgery of some bank notes, one of the banker's clerks whose name was on a forged note swore distinctly that it was his handwriting, while he spoke hesitatingly with regard to his genuine subscription. (d) Standing alone, any of the modes of proof of handwriting

(b) Per Adam, arguendo, in *R. v. Mr. Justice Johnson*, 29 Ho. St. Tr. 475. See, also, per Sir J. Nicholl, in *Constable v. Steibel*, 1 Hagg. N. R. 61. "*Literarum dissimilitudinem sæpe quidem tempus facit, non enim ita quis scribit juvenis et robustus, ac senex et forte tremens, sæpe autem et languor hoc facit: et quidem hoc dicimus, quando calami et atramenti immutatio, similitudinis per omnia aufert puritatem.*" Nov. LXXIII. Præf. See the able article "*Autography*," in *Chambers' Edinburgh Journal* for July 26, 1845, where it is said, "Men of business acquire a mechan-

ical style of writing, which obliterates all natural characteristics, unless in instances where the character is so strongly individual as not to be modified into the general mass. In the present day all females seem to be taught after one model. In a great proportion the handwriting is moulded on this particular model, &c. We often find that the style of handwriting is hereditary, &c., &c."

(c) 8 Ves. 476.

(d) Case of *Carsewell*, Glasgow, 1791 ; cited *Burnett's Crim. Law of Scotland*, 502 ; *Wills, Circ. Ev.* 112 3rd ed.

by resemblance are worth little—in a criminal case nothing—their real value being as adminicula of testimony. But still, if the defendant does not produce evidence to disprove that which is adduced on behalf of the plaintiff, this raises an additional presumption in favor of the latter. Slight evidence, uncontradicted may become cogent proof.

248. Our ancient lawyers appear to have used the expression, “comparison, or similitude of handwriting,” in its more proper and enlarged sense ; as designating any species of presumptive proof of handwriting by resemblance—either comparison with a standard, previously created in the mind *ex visu scriptionis* or *ex scriptis olim visis*, or direct comparison in the modern sense of the word—and to have considered that any of those modes of proof was admissible in civil, and none of them in criminal cases. (*e*) This latter distinction was, however, abandoned in modern times until its partial revival by the Common Law Procedure Act, 1854 ; (*f*) but since the 28 Vict. c. 18, ss. 1 and 8, it may be looked on as completely at an end.

(*e*) See the note to *Doe d. Mudd v. Suckermore*, 5 A. & E. 703, 752 ; and it seems to have been on this principle that the attainder of Algernon Sidney, in 1683, was reversed by statute. His

trial and the statute will be found in 9 Ho. St. Tr. 817, 996.

(*f*) 17 & 18 Vict. c. 125, s. 27 ; *supra*, § 245.

## BOOK III.

RULES REGULATING THE ADMISSIBILITY AND  
EFFECT OF EVIDENCE.*Primary and Secondary Rules of Evidence.*

249. The rules regulating the admissibility and effect of evidence are of two kinds—PRIMARY and SECONDARY ; the former relating to the *quid probandum*, or thing to be proved ; the latter to the *modus probandi*, or mode of proving it. They will be considered in two separate Parts.

## PART I.

## THE PRIMARY RULES OF EVIDENCE.

250. The PRIMARY rules of evidence may all be ranged under three heads, in which we accordingly propose to examine them.

1. To what subjects evidence should be directed.
2. The burden of proof, or *onus probandi*.
3. How much must be proved.

These rules, as stated in a former part of this work, (a) have their basis in universally recognized principles of natural reason and justice ; but owe the shape in which they are actually found, and the extent to which they prevail, to the artificial reason and policy of law.

(a) Bk. 1, pt. 2, § III.

## CHAPTER I.

## TO WHAT SUBJECTS EVIDENCE SHOULD BE DIRECTED.

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251. Of all rules of evidence, the most universal and the most obvious is this—that the evidence ad

duced, should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation. The theoretical propriety of this rule never can be matter of doubt, whatever difficulties may arise in its application. The tribunal is created, to determine matters which either are in dispute between contending parties, or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters, ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. "*Frustrà probatur quod probatum non relevat.*" (a) "Evidence to the jury," says Finch, (b) "is anything whatsoever which serves the party to prove the issue for him: but that which does not warrant the issue is void: as in a formedon, and the gift traversed, the demandant shall not give in evidence another donor." So, on the trial of an indictment for stealing the property of A., and also for receiving it knowing it to have been stolen; evidence of possession by the prisoner, of other property stolen from other persons at other times, was not admissible at common law, to prove either the stealing, or the receiving with guilty knowledge. (c) <sup>1</sup>

(a) Broom's Maxims, xxix. 4th ed.; Halk. Max. 50. "La liberté d'alléguer et de prouver des faits, ne s'étend pas à toutes sortes de faits indistinctement; mais le juge ne doit recevoir la preuve, que de ceux qu'on appelle pertinens; c'est-à-dire, dont on peut tirer des conséquences, qui servent à établir le droit de celui qui allégué ces

faits: et il doit au contraire rejeter ceux dont la preuve, quand ils seroient véritables, seroit inutile." Domat, Lois Civiles, &c., pt. 1, liv. 3, tit. 6, sect. 1, § 10.

(b) Finch, Comm. Laws, 61 b.

(c) R. v. Oddy, 2 Den. C. C. 264. But now, by the 33 & 34 Vict. c. 112, s. 19, "where proceedings are taken

<sup>1</sup> See, as to the *res gestæ*, *Blackwell v. Hamilton*, 47 Ala. 470; *Earle v. Tupper*, 45 Vt. 272; *Filer v. New York Central R. R. Co.*, 49 N. Y. 42; *Tevis v. Hicks*, 41 Cal. 123; *Hamilton v. State*, 36 Ind. 281; *Bench v. Bemis*, 107 Mass. 498; *State v. Keene*, 50 Mo. 357; *Courtney v. Baker*, 34 N. Y. Superior Ct



252. Evidence may be rejected as irrelevant for one of two reasons. 1st. That the connection between the principal and evidentiary facts is too remote

against any person, for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person, other property stolen within the preceding period of twelve months," "for the purpose of proving

that such person knew the property to be stolen, which forms the subject of the proceedings taken against him." This statute, however, does not shift the onus probandi, so as to make it incumbent on the prisoner to prove the absence of guilty knowledge. *R. v. Davis*, 39 L. J., M. C. 135.

529; *Howell v. Huyck*, 2 Abb. (N. Y.) App. Dec. 423; *Kelley v. Campbell*, Id. 492; *People v. Williams*, Id. 596; *Handy v. Johnson*, 5 Md. 450; *Hoyer v. Stevens*, 1 Woodb. & M. 290; *Elliott v. Stoddard*, 98 Mass. 145; *Franklin v. Woodland*, 14 La. Ann. 188; *Corinth v. Lincoln*, 34 Me. 310; *Stewart v. Hanson*, 35 Me. 506; *Duvall v. Medtart*, 4 Har. & J. (Md.) 14; *Curtis v. Moore*, 20 Md. 93; *Land v. Tyngsborough*, 9 Cush. (Mass.) 36; *Crowther v. Gibson*, 19 Mo. 365; *Plumer v. French*, 22 N. H. (2 Fost.) 450; *Johnson v. Elliott*, 26 N. H. (6 Fost.) 67; *Tucker v. Peaselee*, 36 N. H. 167; *Atherton v. Tilton*, 44 N. H. 452; *State v. Huntley*, 3 Ired. (N. C.) L. 418; *Slitt v. Wilson*, *Wright* (Ohio), 505; *Wetmore v. Mell*, 1 Ohio St. 26; *Posterns v. Posterns*, 3 Watts & S. (Pa.) 127; *Hood v. Hood*, 2 Grant (Pa.) Cas. 229; *Rees v. Livingston*, 41 Pa. St. 113; *Turpin v. Brannon*, 3 McCord (S. C.) 261; *Martin v. Simpson*, 4 Id. 262; *James v. Brownfield*, 2 Pa. St. 55; *United States v. Omeara*, 1 Cranch C. Ct. 165; *Webb v. Kelly*, 1 Ala. 349; *Yarborough v. Moss*, 9 Ala. 382; *Hoper v. Edwards*, 20 Ala. 528; *Sanford v. Howard*, 29 Ala. 684; *Bragg v. Massie*, 38 Ala. 89; *Cornelius v. State*, 12 Ark. 782; *Clark v. Rush*, 19 Cal. 393; *Russell v. Frisbie*, 19 Conn. 205; *Robinson v. Lane*, 19 Ga. 337; *Clayton v. Tucker*, 20 Ga. 452; *Rigg v. Cook*, 9 Ill. (4 Gilm.) 336; *Strange v. Donohue*, 4 Ind. 327; *Austin v. Swank*, 9 Ind. 109; *Pains v. Jenkins*, 2 Rich. (S. C.) 106; *Blair v. Coffman*, *Overt*. (Tenn.) 176; *Kerby v. State*, 7 Yerg. (Tenn.) 259; *Evans v. Jones*, 4 Id. 461; *Elkins v. Hamilton*, 20 Vt. 627; *Gillet v. Phelps*, 12 Wis. 392; *Koch v. Howell*, 6 Watts & S. (Pa.) 350; *Tomkins v. Reynolds*, 17 Ala. 109; *People v. Vernon*, 35 Cal. 49; *Mitchum v. State*, 11 Ga. 615; *Handy v. Johnson*, 5 Md. 450; *Meek v. Perry*, 36 Miss. 190; *Matthew v. Coalter*, 9 Mo. 705; *Sessions v. Little*, 9 N. H. 271; *Macy v. De Wolf*, 3 Woodb. & M. 193; *Stein v. State*, 1 Ala. Sel. Cas.

and conjectural. 2nd. That it is excluded by the state of the pleadings-or what is analogous to the pleadings; or is rendered superfluous by the admis-

29; *Robertson v. Smith*, 18 Ala. 220; *Edgar v. McArn*, 22 Ala. 796; *People v. Shea*, 8 Cal. 538; *Carter v. Buchanan*, 3 Ga. 513; *State v. Shelledy*, 8 Iowa, 477; *Steam Navigation Co. v. Dandridge*, 8 Gill & J. (Md.) 248; *Cramer v. Shriner*, 18 Md. 140; *Murray v. Bethune*, 1 Wend. (N. Y.) 191; *McKee v. People*, 36 N. Y. 113; *Hall v. James*, 3 McCord (S. C.) 222; *Fifield v. Richardson*, 34 Vt. 410; *Jewell v. Jewell*, 1 How. 219; 17 Pet, 219; *Hale v. Taylor*, 45 N. H. 405; *Wilson v. Hillyer*, 1 N. J. Eq. (Sax.) 63; *Moore v. Meacham*, 10 N. Y. (6 Seld.) 207; *Weeks v. Lowerre*, 8 Barb. (N. Y.) 530; *Pursell v. Long*, 7 Jones (N. C.) L. 102; *State v. Black*, 6 Jones (N. C.) L. 510; *Bond v. Hunter*, 1 Yeates (Pa.) 284; *Duvall v. Darby*, 38 Pa. St. 56; *Oelrichs v. Artz*, 21 Md. 524; *Salem v. Lynn*, 13 Metc. (Mass.) 544; *Johns v. Johns*, 29 Ga. 718; *Windett v. Taylor*, 28 Ill. 239; *Morris v. Hazlewood*, 1 Bush (Ky.) 208; *D'Aquin v. Barbour*, 4 La. Ann. 441; *Euperrier v. Dautrive*, 12 La. Ann. 664; *Battles v. Batchelder*, 39 Me. 19; *Small v. Gillman*, 48 Me. 506; *Leffler v. Allard*, 18 Md. 545; *Chapin v. Marlborough*, 9 Gray (Mass.) 244; *Cushing v. Willard*, 11 Gray (Mass.) 247; *Barnum v. Hackett*, 35 Vt. 77; *People v. Graham*, 21 Cal. 261; *Noyes v. Ward*, 19 Conn. 250; *Comins v. Comins*, 21 Conn. 413; *Blood v. Ridiout*, 13 Metc. (Mass.) 237; *Moody v. Savin*, 9 Cush. 505; *Commonwealth v. Moulton*, 4 Gray (Mass.) 39; *Stetson v. Howland*, 2 Allen, 591; *Earle v. Earle*, 11 Id. 1; *Cunningham v. Parks*, 97 Mass. 172; *Salmons v. Davis*, 29 Mo. 176; *Sharp v. Miller*, 3 Smed. 42; *Knouse v. Sheffert*, 58 Pa. St. 152; *Gilbert v. Gilbert*, 22 Ala. 529; *Fail v. McArthur*, 31 Id. 26; *Patten v. Ferguson*, 18 N. H. 528; *Morrill v. Foster*, 32 Id. 358; 33 Id. 379; *Currier v. Boston, &c. R. R. Co.*, 34 Id. 498; *People v. Williams*, 3 Park. (N. Y.) Cr. 84; *Webb v. Kelly*, 37 Ala. 333; *Hall v. State*, 40 Id. 698; *Gardner v. People*, 4 Ill. (3 Scam.) 83; *State v. Jackson*, 17 Mo. 544; *People v. Simonds*, 19 Cal. 275; *Shuck v. Vanderverter*, 4 Greene, (Iowa), 264; *Farner v. Turner*, 1 Iowa, 53; *Wadsworth v. Harrison*, 13 Id. 272; *Law v. Cross*, 1 Black, 533; *Wood v. Barker*, 1 Ala. Sel. Cas. 311; 37 Ala. 60; *Hale v. Stone*, 14 Id. 803; *Johnson v. State*, 17 Id. 618; *Hudson v. Crow*, 26 Id. 515; *Johnson v. Boyles*, Id. 576; *Devling v. Little*, 26 Pa. St. 502; *Warner v. Scott*, 39 Id. 274; *Garber v. State*, 4 Coldw. (Tenn.) 161; *Rogers v. Broadnax*, 27 Tex. 238; *Danforth v. Streeter*,

sions of the party against whom it is offered. The use of pleadings, or of some analogous statement of the cases of the contending parties, is to enable the tribunal to see the points in dispute, and the parties to know beforehand what they should come prepared to attack or defend; consequently, although a piece of evidence tendered might, if merely considered per se, establish a legal complaint, accusation, or defense; yet, as the opposite party has had no intimation beforehand that that ground of complaint, &c. would be insisted on, the adducing evidence of it against him, would be taking him by surprise and at a disadvantage. Hence the maxim of pleading, "*Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in iudicium.*" (*d*)

The discussion of the admissibility of evidence

(*d*) Co. Litt. 303 a. See also 5 Co. 61 a; Jenk. Cent. 2, Cas. 64.

28 Vt. 490; Johnson v. Hamburger, 13 Wis. 175; Morgan v. Sims, 26 Ga. 283; Drumright v. State, 29 Id. 430; Nelson v. Smith, 28 Ill. 495; Maher v. Chicago, 38 Ill. 266; Dale v. Gower, 24 Me. 563; Lampley v. Scott, 24 Miss. 528; Gamble v. Johnson, 9 Mo. 605; Palter v. McDowell, 31 Id. 62; Badger v. Story, 16 N. H. 168; Cheswell v. Eastham, Id. 296; Kent v. Harcourt, 33 Barb. (N. Y.) 491; Brice v. Lide, 30 Ala. 647; McLeomore v. Pinkston, 31 Id. 266; Autauga County v. Davis, 32 Id. 703; Dillard v. Scruggs, 36 Id. 670; Gillam v. Sigman, 29 Cal. 637; Printup v. Mitchell, 17 Ga. 558; Dobbs v. Justices, &c., Id. 624; Hart v. Powell, 18 Id. 635; Feagan v. Cune-ton, 19 Id. 404; Commonwealth v. M'Pike, 3 Cush. (Mass.) 181; Bacon v. Charlton, Id. 581; Barber v. Merriam, 11 Allen (Mass.) 322; Hyatt v. Adams, 16 Mich. 180; Hall v. Steamboat Co., 13 Conn. 319; Mitchum v. State, 11 Ga. 615; Black v. Thornton, 30 Id. 361; Black v. Thornton, 31 Id. 641; Stilwell v. New York, &c. R. R. Co., 34 N. Y. 29; Lush v. McDaniel, 13 Ired. (N. C.) L. 485; Denton v. State, 1 Swan. (Tenn.) 297; State v. Davidson, 30 Vt. 377; Boone, &c. Bank v. Wallace, 18 Ind. 82; Knowlton v. Clark, 25 Id. 395; Piles v. Hughes, 10 Iowa, 579; Marcy v. Merchants, &c. Ins. Co., 19 I a. Ann. 388; Kolb v. Whitely, 3 Gill. & J. (Md.) 188.

under the various forms of pleading in particular actions, would be wholly inconsistent with the design of this work; and we will therefore confine ourselves to the general question; before proceeding to which, however, it is important to observe, that there are certain matters which it is unnecessary to prove, *i. e.* 1. Matters noticed by the courts *ex officio*. 2. Matters deemed notorious. “*Lex non requirit verificare quod apparet curiæ.*” (*e*) “*Quod constat curiæ opere testium non indiget.*” (*f*)

**253.** 1. An enumeration of the matters which the courts, in obedience to common or statute law, notice *ex officio*, would here be out of place. (*g*) Suffice it to say generally that, besides noticing the ordinary course of nature, seasons, times, &c., the courts notice without proof various political, judicial, and social matters. Thus, they notice the political constitution of our own government; the territorial extent of the jurisdiction and sovereignty exercised *de facto* by it; the existence and titles of other sovereign powers; the jurisdiction of the superior courts, and courts of general jurisprudence; the seals of the superior courts, and of many others; the custom or law of the road, that horses and carriages shall respectively keep on the left side, &c. &c. In all cases of this kind, where the memory of a judge is at fault, he resorts to such documents or other means of reference as may be at hand, and he may deem worthy of confidence. (*h*) Thus, if the point at issue be a date, the judge will refer to an almanac. (*i*) The printed calender

(*e*) 9 Co. 54 b.

(*f*) 2 Inst. 662.

(*g*) A large number will be found collected in Tayl. Evid. pt. 1, ch. 2, 5th ed., and 1 Phill. Ev. ch. 10, sect. 1, 10th ed.

(*h*) 1 Greenl. Ev. § 6, 7th ed.; Tayl. Ev. § 20, 3rd ed.

(*i*) *Id.*; and see *Sutton v. Darke*, 5 H. & N. 647, 649.

was used for this purpose at least as early as the 9 Hen. VII. (*k*)<sup>1</sup>

254. 2. The law of England is very slow in recognizing matters as too notorious to require proof, (*l*) and it is not easy to lay down a definite rule respecting them. In Richard Baxter's case, in 1685, (*m*) the defendant was charged with having published a seditious libel; and Jefferies, C. J., is reported to have told the jury,—“It is notoriously known there has been a design to ruin the king and nation; the old game has been renewed, and this” (the defendant) “has been the main incendiary.” The iniquity of such a direction as this, supposing it correctly reported, needs no comment. The language of Wilde, C. J., in the case of Ernest Jones, (*n*) who was indicted for making a seditious speech at a public meeting, seems to throw some light on this subject. The Lord Chief Justice there told the jury, that they should take into consideration what they knew of the state of the country and of society generally, at the time when the language was used. What might be innoxious at one time, when there was a general feeling of contentment, might be very dangerous at another time when a different feeling prevailed. But that they could not, without proof of them, take into their consideration particular facts attending the particular meeting at which the words

(*k*) Hil, 9 H. VII. 14 B. pl. 1.

(*m*) 11 Ho. St. Tr. 501.

(*l*) See *Introd.* pt. 2, § 38.

(*n*) *Centr. Cr. Court*, 1841, MS.

<sup>1</sup> See cases cited *ante*, note 1, page 408; and as to statutes, *Schlesinger v. Hexter*, 34 N. Y. Superior Ct. 499; *State v. Morphy*, 33 Iowa, 270; *State v. Lipscomb*, 52 Md. 32; *McDonald v. Kirby*, 3 Heisk. 607; *Bond v. Perkins*, 4 Id. 364; *Killebrew v. Murphy*, 3 Id. 546; *Rice v. Shook*, 27 Ark. 137; *Smither v. Flournoy*, 47 Ala. 345; *Buchanan v. Whitam*, 36 Ind. 257; *Bowie v. City of Kansas*, 57 Mo. 454.

were spoken. And this seems confirmed by a case of *R. v. Dowling* decided the same year. (o)<sup>1</sup>

255. The rejection of evidence on the ground of remoteness, or want of reasonable connection between the principal and evidentiary facts, has been shown, in another place, to be a branch of that fundamental principle of our law, which requires the best evidence to be adduced. (p) The rule has obviously no application where the evidence tendered is either direct, or, though circumstantial, is necessarily conclusive upon the issue. But whether a given piece of presumptive evidence is receivable, or ought to be rejected on this ground, is not unfrequently a question of considerable difficulty. Some instances illustrative of this have already been given, (q) to which may be added the following. On a question between landlord and tenant, as to the terms on which the premises were held, although it might assist, to know the terms on which the landlord usually let to his other tenants, not connected with the tenant whose case is under consideration, the evidence would be rejected as too remote. (r) So in an action for goods sold and delivered, to which the defense was that the sale was subject to a certain condition; it was held not competent to the defendant to call witnesses, to prove that the plaintiff had made contracts with other persons subject to that condition. (s)

(o) MS., cited Arch. Cr. Pl. 147, 15th ed., Centr. Cr. Court. See further, *Moody v. The London & Brighton Railw. Co.*, 1 B. & S. 290, 293; *Parker v. Green*, 2 Id. 299; *Holcombe v. Hewson*, 2 Camp. 391.

(p) Bk. 1, pt. 1, §§ 88, 90 et seq.

(q) Id. § 92.

(r) *Carter v. Pryke*, 1 Peake, 95.

See *Spenceley v. De Willott*, 7 East, 110.

(s) *Hollingham v. Head*, 4 C. B., N. S. 388. Where, in an action against A., to recover the value of work done by the plaintiff to certain houses, on the order of B., the question was, whether A. or B. was liable as principal; evidence was held to be admis-

<sup>1</sup> See ante, note 1, page

But acts unconnected with the act in question are frequently receivable to prove psychological facts, such as intent. (*t*) Thus on an indictment for uttering a forged bank note, evidence is admissible that the accused has uttered similar forged notes, &c. (*u*) And in a recent case it was said, that it seemed clear, on principle, that when the fact was proved that the prisoner had done the act charged; and the only remaining question was whether, at the time he did it, he had a guilty knowledge of the quality of his act, or acted under a mistake; evidence was admissible to show that he was, at that time, pursuing a course of similar acts, and thereby to raise a presumption that, in the case in question, he was not acting under a mistake. (*v*)

256. One of the strongest instances of the beneficial application of the principle in question, is to be found in the rules respecting the admissibility of evidence to character. That the general reputation and previous conduct of a litigant party or witness, is often of immense weight as natural or moral evidence, as tending to raise a presumption that his action or defense is well or ill-founded, or that the evidence which he gives is true or false, must be obvious. But on the other hand, the exposing every man who comes into our courts of justice, to have every action of his life publicly scrutinized, would keep most men out of them. (*x*) To admit character evidence in every case, or to reject it in every case, would be equally fatal to justice; and to draw the line—to define with precision where

sible, to prove that A. had given orders to persons, other than the plaintiff, to do work at the same houses. *Woodward v. Buchanan*, L. Rep., 5 Q. B. 285.

(*t*) *R. v. Weeks*, 1 Leigh & C. 18.

(*u*) *Infra*, pt. 2, ch. 1.

(*v*) Per cur., *R. v. Francis*, L. Rep., 2 C. C: 128, 131; 43 L. J., M. C. 97, 100.

(*x*) *Fost. Cr. Law*, 246.

it ought to be received. and where it ought to be rejected—is as embarrassing a problem as any legislator can be called upon to solve. (*y*)

257. With respect to the character of parties to a cause, the law of England meets the difficulty, by making a distinction between cases where their character ought to be supposed to be in issue, and where it ought not. According to the general rule, upon the whole probably a just one, it is not competent to give evidence of the general character of the parties to forensic proceedings, much less of particular facts not in issue in the cause, with the view of raising a presumption either favorable to one party or disadvantageous to his antagonist. (*z*) This principle has been carried so far that, on a prosecution for an infamous offense, evidence of an admission by the accused, that he was addicted to the commission of similar offenses, was rejected as irrelevant. (*a*)

258. But where the very nature of the proceedings is such, as to put in issue the character of any of the parties to them, a different rule necessarily prevails; and it is not only competent to give general evidence of the character of the party with reference to the issue raised, but even to inquire into particular facts tending to establish it. (*b*) Thus, on an indictment for keeping a common bawdy-house, or common gaming-house, (*c*) or for being a common barretor, (*d*) the

(*y*) Even Bentham, 3 *Jud. Ev.* 193, admits the difficulties of this subject, and says that some of them seem scarce capable of receiving solution but in the Gordian style.

(*z*) *Phill. & Am. Ev.* 488-91; 1 *Phill. Ev.* 502-508, 10th ed.; *King v. Francis*, 3 *Esp.* 117, per Lord Kenyon.

(*a*) *R. v. Cole*, *Mich.* 1810, by all the judges. *Phill. & Am. Ev.* 499; 1 *Phill. Ev.* 508, 10th ed.

(*b*) *Bull. N. P.* 295.

(*c*) *Clark v. Periam*, 2 *Atk.* 339.

(*d*) 2 *Stark. Ev.* 304, 3rd ed. In cases of barretry, however, notice must be given to the defendant, of the particular acts of barretry intended to be relied on at the trial. *Id.*; *B. N. P.* 296; *Goddard v. Smith*, 6 *Mod* 261, 262; *R. v. Rowton*, 1 *Leigh & C* 520, 542, per Willes, J.



prosecutor may give in evidence, any acts of the defendant which support the general charge. So, where the issue is whether a party is non compos mentis, proof may be adduced of particular acts of insanity. (*e*) In actions for seduction, (*f*) and criminal conversation, (*g*) while that species of action existed, (*h*) the character of the female for chastity is directly in issue, and may be impeached either by general evidence of misconduct, or proof of particular acts of it. So, a charge of rape, (*i*) or of assault with intent to commit rape, (*k*) brings the question of the chastity of the female so far in issue, that it is competent to the accused to give general evidence of her previous bad character in this respect; or even to show that she has been criminally connected with himself. (*l*) But the authorities are not agreed as to whether, and under what circumstances, he will be allowed to prove particular acts of unchastity committed by her with other men. (*m*)

259. Although in criminal prosecutions in general, the character of the accused is not in the first instance put in issue, still in all cases where the direct object of the proceedings is to punish the offense,—such as indictments for treason, felony, or misdemeanor; (*n*) and is not merely the recovery of a pen-

(*e*) *Clark v. Periam*, 2 Atk. 340.

(*f*) *Phill. & Am. Ev.* 488, 489; 1 *Phill. Ev.* 503, 10th ed.; *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Id. 519; *Verry v. Watkins*, 7 C. & P. 308.

(*g*) *B. N. P.* 296; 1 *Selw. N. P.* 26, 9th ed.; *Elsam v. Faucett*, 2 Esp. 562, per Lord Kenyon, C. J.; *R. v. Barker*, 3 C. & P. 589, per Park, J.

(*h*) See bk. 2, pt. 1, ch. 2, § 182.

(*i*) *Phill. & Am. Ev.* 489; 1 *Phill. Ev.* 505, 10th ed.; *R. v. Martin*, 6 C.

& P. 562; *R. & Barker*, 3 C. & P. 589.

(*k*) *Phill. & Am. Ev.* 489; 1 *Phill. Ev.* 505, 10th ed.; *R. v. Clarke*, 2 Stark. 244.

(*l*) *R. v. Martin*, 6 C. & P. 562; *R. v. Aspinwall*, 3 Stark. Ev. 952, 3rd ed.

(*m*) See *Tayl. Evid.* §§ 336 and 1296, 4th ed.

(*n*) 2 Stark. Ev. 304, 3rd ed.; *Phill. & Am. Ev.* 490; 1 *Phill. Ev.* 506, 10th ed.

alty, (o) it is competent to him to defend himself by proof of previous good character, reference being had to the nature of the charge against him. "On a charge of stealing," says a well-known treatise on the Law of Evidence, (p) "it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings." Such evidence relates to principles of moral conduct which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry, it would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question."

260. Few subjects are more liable to be misunderstood than character evidence. On an indictment for stealing from A., for instance, proof that on other occasions, wholly unconnected with the transaction in question, the accused acted the part of an honest, or even liberal and high-minded man, in certain transactions with B. and C.,—even assuming that it would, to a certain extent, render improbable the supposition of his having acted with felonious dishonesty towards A.,—is too remote and insignificant to be receivable in evidence. The inquiry should be as to his general character among those who have known him, with a view of showing that his general reputation for honesty is such as to render unlikely the conduct imputed to him. And even the individual opinion of a witness, founded on his own personal experience of the

(o) Phill. & Am. Ev. 488; 1 Phill. Ev. 502, 10th ed. See also Att.-Gen. v. Radloff, 10 Exch. 84. (p) Phill. & Am. Ev. 490, 491; 1 Phill. Ev. 506, 10th ed.

disposition of the accused, is inadmissible. (*q*) "It frequently occurs, indeed," says the author last quoted, "that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favor to the prisoner, than strictly as evidence of general character." (*r*)

261. Whenever it is allowable to impeach the character of a party, it is competent to the other side to give evidence to contradict the evidence adduced. (*s*) And although in a criminal prosecution evidence cannot in the first instance be given to show that the accused has borne a bad character, still, if he sets up his character as an answer to the charge against him, he puts it in issue, and the prosecutor may encounter his evidence either by cross-examination or contrary testimony. (*t*) In *R. v. Wood* (*u*) the prisoner, who was indicted for a highway robbery, called a witness, who deposed to having known him for years, during which time he had, as the witness said, borne a good character. On cross-examination it was proposed to ask the witness whether he had not heard that the prisoner was suspected of having committed a robbery, which had taken place in the neighborhood some years before. This was objected to as raising a collateral issue: but Parke, B., overruled the objection, saying, "The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of hav-

(*q*) *R. v. Rowton*, 34 L. J., M. C. 57; 1 Leigh & C. 520; by eleven judges against two.

(*r*) Phill. & Am. Ev. 491; 1 Phill. Ev. 506, 10th ed.

(*s*) *R. v. Murphy*, 19 Ho. St. Tr. 724; B. N. P. 296; *R. v. Clarke*, 2 Stark. 241; *Bamfield v. Massey*, 1

Camp. 460; *Dodd v. Norris*, 3 Camp. 519.

(*t*) *R. v. Rowton*, 34 L. J., M. C. 57; 1 Leigh & C. 520; overruling *R. v. Burt*, 5 Cox, Cr. Cas. 284. See also 2 Stark. Ev. 304, 3rd ed.; Bull. N. P. 296; 2 Russ. Cr. 786, 3rd ed.

(*u*) Kent. Sp. As. 1841, MS.; and 5 Jurist, 225.

ing been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." The question was accordingly put, and the prisoner convicted.

But as it is not competent for the accused to show particular acts of good conduct, the prosecutor cannot, in general, go into particular cases of misconduct; the only exception to this rule, having been introduced by the statute 6 and 7 Will. 4, c. 111, which enacts that if upon the trial of any person for any subsequent felony, not punishable with death, he shall give evidence of his good character, it shall be lawful in answer thereto, to give evidence of his conviction for a previous felony. (*v*) And it has been held that a case is equally within this enactment, whether the evidence to character was given by witnesses called on the part of the accused, or was extracted by cross-examination from witnesses for the prosecution. (*x*) In practice, however, we seldom see evidence adduced to rebut evidence as to character; although perhaps the interests of justice would be advanced, if this were done more frequently.

**262.** Witnesses to the characters of parties are in general treated with great indulgence—perhaps too much. Thus, it is not the practice of the bar to cross-examine such witnesses, unless there is some specific charge on which to found a cross-examination, (*y*) or at least without giving notice of an intention to cross-examine them if they are put in the box. The judges also discourage the exercise of the undoubted right of prose-

(*v*) A subsequent act, the 14 & 15 Vict. c. 19, s. 9, provided that if, upon the trial of any person for an offense, such person should give evidence of his good character, it should be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of

such person for a previous offense, or offenses. But this section was repealed by 24 & 25 Vict. c. 95.

(*x*) *R. v. Shrimpton*, 2 Den. C. C 319; 3 Car. & K. 373.

(*y*) *R. v. Hodgkiss*, 7 C. & P 298.

cuting counsel, to reply on their testimony ; (z) and the most obvious perjury in giving false characters for honesty, &c., is every day either overlooked, or dismissed with a slight reprimand. But surely this is mercy out of place. If mendacity in this shape is not to be discouraged, tribunals will naturally be induced either to look on all character evidence with suspicion, or to attach little weight to it. Now there are many cases, in which the most innocent man has no answer to oppose to a criminal charge, but his reputation ; and to deprive this of any portion of the weight legitimately due to it, is to rob the honest and upright citizen of the rightful reward of his good conduct. In this, as in many other instances, the old legal maxim holds good, "*Minatur innocentes qui parcit nocentibus.*" (a) It has accordingly happened that judges, knowing from experience how little weight is due to the character evidence so often received, have occasionally told juries that character evidence is not to be taken into consideration unless a doubt exists on the other evidence—a position perfectly true in the sense that if, on the facts, the jury believe the accused guilty, to acquit him out of regard for his good character would be a violation of their oath ; but utterly false and illegal, if its meaning be, that character evidence is not to be considered, until the guilt or innocence of the accused is first determined on the facts. The use of character evidence is to assist the jury in estimating the value of the evidence brought against the accused ; and we cannot dismiss this subject without directing attention to the

(z) *R. v. Stannard*, 7 C. & P. 673.  
That the right exists, see that case,  
and the resolutions of the judges, 7 C.

& P. 676, Res. 4 ; and *R. v. Whiting*  
7 C. & P. 771.

(a) 4 Co. 45 a. See also *Jenk. Cent*  
3, Cas 54.

shrewd observations of C. J. Holt: (b) "A man is not born a knave; there must be time to make him so, nor is he presently discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next."<sup>1</sup>

**263.** With respect to the character of witnesses.

(b) *R. v. Swendsen*, 14 Ho. St. Tr. 596.

<sup>1</sup> In a civil suit evidence of good character is not admissible to rebut imputations of misconduct or fraud. *Williams v. Waters*, 36 Ga. 459; *Montgomery v. Hunt*, 5 Cal. 366; *Boardman v. Woodman*, 47 N. H. 120; *Ward v. Henderson*, 5 Port. (Ala.) 382; *Church v. Drummond*, 7 Ind. 17; *Revill v. Pettit*, 3 Metc. (Ky.) 314; *Morris v. Hazlewood*, 1 Bush. (Ky.) 208; *Potter v. Webb*, 6 Me. (6 Greenl.) 14; *Thayer v. Boyle*, 30 Me. 475; *Gutzwiller v. Lackman*, 23 Mo. 168; *Porter v. Seiler*, 23 Pa. St. 424; *Fowler v. Ætna Ins. Co.*, 6 Cow. 382. And see generally as to character, *State v. Wells*, 1 N. J. L. (Coxe) 124; *Smith v. Plunkett*, 1 Strobh. 372; *Wright v. McKee*, 37 Vt. 161; *Commonwealth v. Sacket*, 22 Pick. 394; *State v. Cresson*, 38 Mo. 372; *People v. Bodine*, 1 Edm. (N. Y.) Select. Cases, 36; *State v. O'Niel*, 7 Ired. (N. C.) L. 251; *Ackley v. People*, 9 Barb. (N. Y.) 609; *State v. Upham*, 38 Me. 261; *Humphrey v. Humphrey*, 7 Conn. 116; *People v. Sosephis*, 7 Cal. 129; *Ketland v. Bissett*, 1 Wash. 144; *Pratt v. Andrews*, 4 N. Y. (4 Comst.) 493; *Goldsmith v. Picard*, 27 Ala. 142; *Rosenbaum v. State*, 33 Id. 354; *Thompson v. Church*, 1 Root (Conn.) 312; *Boatright v. Porter*, 32 Ga. 130; *Johnson v. Howard*, 1 Har. & M. (Md.) 281; *Boyn-ton v. Kellogg*, 3 Mass. 189; *Bruce v. Priest*, 5 Allen (Mass.) 100. *Whittier v. Franklin*, 46 N. H. 23; *Gandolfo v. State*, 11 Ohio St. 114; *Anderson v. Long*, 10 Serg. & R. (Pa.) 55; *S. P. Atkinson v. Graham*, 5 Watts (Pa.) 411; *State v. O'Connor*, 31 Mo. 389; *People v. Cole*, 4 Park. (N. Y.) Cr. 35; *State v. Dalton*, 27 Mo. 13; *Bennett v. State*, 8 Humph. (Tenn.) 118; *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. St. 104; *United States v. Roudebush*, 1 Bald. 514; *Felix v. State*, 18 Ala. 720; *People v. Milgate*, 5 Cal. 127; *Keener v. State*, 18 Ga. 194; *Epps v. State*, 19 Id. 102; *Engleman v. State*, 2 Ind. 92; *State v. Ford*, 3 Strobh. (S. C.) 517; *Maury v. Tal-mage*, 2 McLean, 157; *Searcy v. Fearn*, 2 Stew. & P. (Ala.) 128; *Allen v. Prather*, 35 Ala. 169.

The credibility of a witness is always in issue ; and accordingly general evidence is receivable, to show that the character which he bears is such that he is unworthy to be believed, even when upon his oath. (*c*) But, until recently, evidence of particular facts, or particular transactions, could not be received for this purpose ; both for the reasons already assigned, (*d*) and also because such evidence would raise a collateral issue, *i. e.*, an issue foreign to that which the tribunal is sitting to try. (*e*) The witness might indeed be questioned as to such facts or transactions ; but he was not always bound to answer ; and if he did, the party questioning was bound to take his answer, and could not call evidence to contradict it. (*f*) But the law on this subject was modified as to civil cases, by the 17 & 18 Vict. c. 125, s. 25, which enacts, that “ A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction ; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offense, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, &c., shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.” And this provision has since

(*c*) *R. v. Brown*, L. Rep., 1 C. C. 32 Id. 490-5 ; *B. N. P.* 296 ; *Stark Ev.* 237-8, 4th ed. ; *R. v. Burke*, 70.

(*d*) §§ 256, 260, 261.

*Cox, Cr. Cas.* 44.

(*e*) 13 Ho. St. Tr. 211 ; 16 Id. 246-7 ; (*f*) *Supra*, bk. 2, pt. 1, ch. 2.

been extended to criminal cases, by the 28 Vict. c. 18, ss. 1 and 6.<sup>1</sup>

264. In determining the relevancy of evidence to the matters in dispute in a cause, it is of the utmost importance to remember, that the question is whether the evidence offered is relevant to any of them; because evidence not admissible in one point of view, or for one purpose, may be perfectly admissible in some other point of view, or for some other purpose.

1. Evidence not admissible to prove some of the issues or matters in question, may be admissible to prove others; evidence not admissible in *causâ*, may be most valuable as evidence *extra causam*; and evidence not receivable either in proof of the facts in dispute, or to test the credit of witnesses, &c., may be important as showing the amount of damage sustained by a plaintiff, &c.

2. Evidence not admissible in the first instance, may become so by matter subsequent. Thus, in a suit between A. and B., the acts or declarations of C. are *primâ facie* not evidence against B., and ought to be rejected; but if it be shown that C. was the lawfully constituted agent of B., either generally, or with respect to the special matter in question, his acts or declarations become evidence against his principal. So a litigant party may, by his mode of conducting his case, render that evidence for his adversary, which otherwise would not be so. Thus, although a man's own verbal or written statement cannot be used as evidence for him; yet if his adversary puts such a statement in evidence

<sup>1</sup> *United States Express Co. v. Hutchins*, 58 Ill. 44; *Pope v. Dodson*, Id. 360; *Whitten v. State*, 47 Ga. 297; *Mathilde v. Levy*, 24 La. Ann. 421; *Carver v. Louthain*, 38 Ind. 530; *Carner v. Charter Oak Ins. Co.*, 1 Abb. (N. Y.) App. Dec. 316; *Rudshill v. Slingerland*, 18 Minn. 380; *Graham v. Chrystal*, 2 Abb. (N. Y.) App. Dec. 263.



against him, he is entitled to have the whole of it proved; and the jury may estimate the probability of any part of it which makes in his favorite. 3. Evidence may be admissible to prove a subalternate principal fact, which might not be admissible to prove the immediate fact in issue. This is of course subject to the rule requiring the best evidence; for the connection between the subalternate principal fact and the ultimate evidentiary fact must be as open, visible, and un conjectural in its nature, as that between the subalternate principal fact and the fact directly in issue. In all cases, as has been well observed, the ultimate presumption must be connected either mediately or immediately with facts established by proof. (*g*)<sup>1</sup> .

(*g*) 2 Ev. Poth. 332.

<sup>1</sup> And see cases cited, *ante*, note 1, p. 352.

## CHAPTER II.

## THE BURDEN OF PROOF.

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**265.** The burden of proof, or onus probandi, is governed by certain rules, having their foundation in principles of natural reason, to which an artificial weight is superadded by the reason and policy of the law; (*a*) and in order to form clear notions on this subject, the best course will be to consider it, first, in the abstract, and afterwards as connected with jurisprudence.

**266.** Every controversy ultimately resolves itself into this, that certain facts or propositions are asserted by one of the disputant parties, which are denied, or at least not admitted, by the other. Now, where there are no antecedent grounds for supposing that which is asserted by the one party, is more probable than what is denied by the other, and the means of proof are equally accessible to both, the party who asserts the fact or

(*a*) Introd. pt. 2, § 42.

proposition must prove his assertion,—the burden of proof, or *onus probandi*, lies upon him ; and the party who denies that fact or proposition, need not give any reason or evidence to show the contrary, until his adversary has at least laid some probable grounds for the belief of it. The reason for this is clear. On all matters which are not the subject either of intuitive or sensitive knowledge, which are either not susceptible of demonstration, or are not demonstrated, and which are not rendered probable by experience or reason, the mind suspends its assent until proof is adduced ; and where effective proofs are in the power of a party who refuses or neglects to produce them, that naturally raises a presumption that those proofs, if produced, would make against him. It is obvious that, in a complicated controversy, the burden of proving some of the matters in dispute may rest on one of the parties, while the burden of proving the rest may be on his adversary.

267. One of the causes, as was shown in the introduction to this work, which renders artificial rules of evidence indispensable to municipal law, is the necessity for speedy action in tribunals. (*b*) In order to do complete justice, tribunals must be supplied by law with rules which shall enable them to dispose, one way or the other, of all questions which come before them ; whatever the nature of the inquiry ; or however difficult, or even impossible, it may be to get at the real truth. And as the law takes nature for its model, and works on her basis as far as possible, the best mode of effecting this object is, to attach an artificial weight to the natural rules by which the burden of proof is governed, and to enforce its order more strictly than is observed in other controversies. Courts

(*b*) *Introd.* pt. 2, §§ 41, 42.

of justice are not established for the decision of abstract questions—"Interest reipublicæ ut sit finis litium." (*c*) And therefore the man who brings another before a judicial tribunal, must rely on the strength of his own right and the clearness of his own proof, and not on the want of right, or the weakness of proof in his adversary. (*d*) Hence the great principle which has been variously expressed by the maxims, "Actori incumbit onus probandi;" (*e*) "Actori incumbit probatio;" (*f*) "Actore non probante, reus absolvitur;" (*g*) "Semper necessitas probandi incumbit illi qui agit;" (*h*) "Actore non probante: qui convenitur, etsi nihil ipse præstat, obtinebit;" (*i*) "Deficiente probatione, remanet, reus ut erat antequam conveniretur," (*k*) &c. The plaintiff is bound in the first instance to show at least a *primâ facie* case, and if he leaves it imperfect the court will not assist him: "Melior est conditio rei quam actoris;" (*l*) "Favorabiliores rei potius quam actores habentur;" (*m*) "Potior est conditio defendentis;" (*n*) "Cum sunt partium jura obscura, reo favendum est potius quam actori;" (*o*) "In dubio secundum reum, potius quam secundum actorem litem dari oportet;" (*p*) "Semper in obscuris quod minimum est sequimur;" (*q*) "In obscuris minimum est sequendum,"

(*c*) *Introd.* pt. 2. §§ 41, 43.

(*d*) *Vaugh.* 60; *Show. P. C.* 221: 5 *T. R.* 110 (*n*); 1 *H. & N.* 744; *Midland Railw. Co. v. Bromley*, 7 *C. 1 B.* 372; *Doe d. Welsh v. Langfield*, 16 *M. & W.* 497.

(*e*) 4 *Co.* 71 b.

(*f*) *Hob.* 103.

(*g*) *Bonnier, Traité des Preuves*, §§ 39 and 42.

(*h*) *Inst. lib.* 2, tit. 20, § 4; *Dig. lib.* 22, tit. 3, l. 21.

(*i*) *Cod. lib.* 2, tit. 1, l. 4.

(*k*) *Gibert, Corp. Jur. Canon. Prolegom. Pars Post. tit.* 7, cap. 2, § 11, No. 7.

(*l*) 4 *Inst.* 180.

(*m*) *Dig. lib.* 50, tit. 17, l. 125.

(*n*) *Cowp.* 343; 8 *Wheat.* 195.

(*o*) *Sext. Decretal. lib.* 5, tit. 12; *De Regulis Juris*, Reg. 11.

(*p*) *Heinec. ad Pand. pars* 4, § 144.

(*q*) *Dig. lib.* 50, tit. 17, l. 9; 1 *Ev. Poth.* § 711. See, however, *Dig. lib.* 50, tit. 17, l. 114.

(*r*) &c. Thus where, in an action for goods sold and delivered by a liquor merchant, the only evidence was that several bottles of liquor, of what kind did not appear, were delivered at the defendant's house, Lord Ellenborough directed the jury to presume that they were filled with the cheapest liquor in which the plaintiff dealt. (*s*) So where, in an action for money lent, it appeared in evidence that, the defendant having asked the plaintiff for some money, the plaintiff delivered to him a bank-note, the amount of which could not be proved, it was held by the Court of Exchequer that the jury were rightly directed, to presume it to have been for the note of lowest amount in circulation. (*t*) When however the defendant, or either litigant party instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he in his turn is bound to show a *primâ facie* case at least, and if he leaves it imperfect the court will not assist him: "Agere is videtur, qui exceptione utitur; nam reus in exceptione actor est;" (*u*) "In exceptionibus dicendum est, reum partibus actoris fungi oportere;" (*v*) "Reus excipiendo fit actor;" (*x*) "In genere quicumque aliquid dicit, sive actor sive reus, necesse est ut probet." (*y*) It is in this sense that the maxim, "Semper præsumitur pro negante," (*z*) and the expression that the law presumes against the plaintiff's demand, (*a*) are to be understood. And although the burden of proof must, in the first instance, be determined by the issues as they appear on the pleadings, or whatever according

(*r*) Sext. Decretal. lib. 5, tit. 12;  
De Reg. Jur. Reg. 31.

(*s*) Clunnes v. Pezzey, 1 Camp. 8.

(*t*) Lawton v. Sweeney, 8 Jur. 964.

(*u*) Dig. lib. 44, tit. 1. l. 1.

(*v*) Dig. lib. 22, tit. 3, l. 19,

(*x*) Bonnier, Traité des Preuves, §§  
152, 320. See also Devotus, Inst.  
Canon. lib. 3, tit. 9, § 2.

(*y*) Matthæus de Prob. c. 8, n. 4.

(*z*) 10 Cl. & F. 534.

(*a*) Clunnes v. Pezzey, 1 Camp. 8.

to the practice of the court and nature of the case is analogous to pleadings, it may, and frequently does, shift in the course of a trial. On an indictment for libel, for example, to which the defendant pleads simply not guilty, the burden of proof would lie, in the first instance, on the prosecutor. But on proof that the document, the subject of the indictment, contained matter libellous per se, and was published by the defendant's showing it to A. B., the law would presume the publication malicious, and cast on the defendant the onus of rebutting that presumption. And if he were to prove in his defense, that it was shown to A. B. under such circumstances as to render it, *prima facie* a confidential communication, the burden of proof would again change sides, and it would lie on the prosecutor to prove malice in fact.

268. In order to determine on which of two litigant parties the burden of proof lies, the following test was suggested by Alderson, B., in *Amos v. Hughes*, (*b*) in 1835, viz., "which party would be successful if no evidence at all were given?" This test was applied by the learned Baron in subsequent cases; (*c*) and it has been adopted by other judges at *nisi prius*, (*d*) and frequently recognized by higher tribunals. (*e*) As, however, the question of the burden of proof may present itself at any moment during a trial, the test ought in strict accuracy to be expressed thus, viz.:—"which party would be successful, if no evidence at all, or no

(*b*) 1 Moo. & R. 464. See also the observations of the same judge, in *Huckman v. Fernie*, 3 M. & W. 505, and *Mills v. Barber*, 1 Id. 425.

(*c*) *Belcher v. McIntosh*, 8 C. & P. 720; *Ridgway v. Ewbank*, 2 Moo. & R. 217; *Geach v. Ingall*, 14 M. & W. 100.

(*d*) *Osborn v. Thompson*, 2 Moo. & R. 254; *Doe d. Worcester Trustees v. Rowlands*, 9 C. & P. 735.

(*e*) *Barry v. Butlin*, 2 Moo. P. C. C. 484; *Leete v. The Gresham Life Insurance Society*, 15 Jurist, 1161, &c. See the judgment in *Doe d. Caldecott v. Johnson*, 7 Man. & Gr. 1047

more evidence, as the case may be, were given ;" (*f*) and this of course depends on the principles regulating the burden of proof. These we now proceed to examine more closely ; first observing, however, that in many cases the burden of proof is cast by statute on particular parties. (*g*)<sup>1</sup>

(*f*) See *Baker v. Batt*, 2 Moo. P. 17 & 18 Vict. c. 104, s. 169 ; 23 & 24 C. C. 317, 319. Vict. c. 22, s. 30 ; 24 & 25 Vict. c. 98,

(*g*) See a large number collected in ss. 9, 10, 11, 16, 17 ; and c. 99, ss. 6, Tayl. Ev. §§ 345 et seq., 4th ed. ; also 7, 8, &c.

<sup>1</sup> And see *Barnes v. Allen*, 1 Abb. (N. Y.) App. Dec. 111 ; *State v. Farr*, 33 Iowa, 555 ; *State v. Patterson*, 45 Vt. 308 ; *Byrd v. Fleming*, 4 Bibb, 143 ; *Warner v. Daniels*, 1 Woodb. & M. 90 ; *Pennington v. Gell*, 11 Ark. 212 ; *Richmond v. Aiken*, 25 Vt. 324 ; *Tanner v. Hughes*, 53 Pa. St. 289 ; *McAleer v. McMurray*, 58 Id. 126 ; *People v. Hessing*, 28 Ill. 410 ; *Chickering v. Failles*, 26 Id. 507 ; *Pratt v. Lamson*, 6 Allen (Mass.) 457 ; *Central Bridge v. Butler*, 2 Gray (Mass.) 130 ; *Commonwealth v. Daley*, 4 Id. 209 ; *State v. Melton*, 8 Mo. 417. To the contrary, *Burgess v. Lloyd*, 7 Md. 178. *Treadwell v. Joseph*, 1 Sumn. 390 ; *Winans v. Winans*, 19 N. J. Eq. 220 ; *Costigan v. Mohawk, &c. R. R. Co.*, 2 Den. (N. Y.) 609 ; *Grims v. Tidmore*, 8 Ala. 746 ; *Phelps v. Hartwell*, 1 Mass. 71 ; *Blany v. Sargeant*, Id. 335 ; *Buckminister v. Perry*, 4 Id. 393 ; *Phillips v. Ford*, 9 Pick. (Mass.) 39 ; *Thompson v. Lee*, 8 Cal. 275 ; *Nash v. Hall*, 4 Ind. 444 ; *McClure v. Pursell*, 6 Id. 330 ; *Stevenson v. Marony*, 29 Ill. 532 ; *Powers v. Russell*, 13 Pick. (Mass.) 69 ; *Loring v. Steineman*, 1 Metc. (Mass.) 204 ; *Kyle v. Calmes*, 2 Miss. (1 How.) 121 ; *Pusey v. Wright*, 31 Pa. St. 387 ; *Wolcott v. Holcomb*, 31 N. Y. 125 ; *Zerbe v. Miller*, 16 Pa. St. 488 ; *Henderson v. State*, 14 Tex. 503 ; *Brandon v. Cabiness*, 10 Ala. 155 ; *Spaulding v. Harvey*, 7 Ind. 429 ; *Hale v. Hazelton*, 21 Wis. 320 ; *Shiels v. West*, 17 Cal. 324 ; *State v. Knapp*, 45 N. H. 148 ; *Pittsfield v. Barnstead*, 38 N. H. 115 ; *Brown v. Bulkley*, 13 N. J. Eq. (1 McCart.) 451 ; *Tinn v. Wharf Co.*, 7 Cal. 253 ; *Loomis v. Greenl.*, 7 Me. (7 Greenl.) 386 ; *Oppenheim v. Leo Woolf*, 3 Sandf. (N. Y.) Ch. 571 ; *Frost v. Brown*, 2 Bay (S. C.) 133 ; *Ford v. Simmons*, 13 La. Ann. 397 ; *Great Western R. R. Co. v. Bacon*, 30 Ill. 347 ; *Pack v. Chapman*, 16 La. Ann. 366 ; to the contrary, *Southern Ins. & Life Co. v. Cole*, 4 Fla. 359 ; *Carver v. Harris*, 19 La. Ann. 121 ; *New Haven Copper Co. v. Brown*, 46 Me. 418 ; *Gregory v. Pugh*, 4 Rand. (Va.) 611.

269. 1. The general rule is, that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute—according to the maxim, “*Ei incumbit probatio, qui dicit; non qui negat* ;” (*h*) a rule to which the common sense of mankind at once assents; and which, however occasionally violated in practice, has ever been recognized in jurisprudence. (*i*) One of the civilians speaks of it as “*Regula lippis et tonsoribus nota*.” (*k*)

270. Much misconception and embarrassment have been introduced into this subject, by some unfortunate language in which the above principle has been enunciated. “*Per rerum naturam*,” says the text of the Roman law, “*factum negantis probatio nulla sit* ;” (*l*) and our old lawyers lay down broadly, “It is a maxim in law that witnesses cannot testify a negative, but an affirmative.” (*m*) From these and similar expressions it has been rashly inferred, and is frequently asserted, that “a negative is incapable of proof,”—a position wholly indefensible if understood in an unqualified sense. Reason and the context of the passage in the Code alike show, that by the phrase “*per rerum naturam, &c.*,” nothing more was meant, than to express the undoubted truth that, in the ordinary course of things, the burden of proof is not to be cast on the party who merely denies an assertion. The ground on which this rests has been already explained; (*n*) and another grave objection to requiring proof of

(*h*) Dig. lib. 22, tit. 3, l. 2; 1 Stark. Ev. 418, 3rd ed.; 586, 4th ed.; Phill. & Am. Ev. 827.

(*i*) Voet. ad Pand. lib. 22, tit. 3, N. 10; Vinnius, Jurisp. Contract, lib. 4, c. 24; Domat, Lois Civiles, pt. 1, liv. 3, tit. 6, sect. 1, §§ 6 and 7; Bonnier, Traité des Preuves, § 29; Co. Litt. 6 b; 2 Inst. 662; Gillb. Ev. 145, 4th

ed.; Stark. Ev. 585-7, 4th ed. See some other old authorities, *supra*, bk. 1, pt. 2, § 111, n. (g).

(*k*) Matthæus de Prob. c. 8, n. 1.

(*l*) Cod. lib. 4, tit. 19, l. 23.

(*m*) Co. Litt. 6 b; 2 Inst. 662. See also 4 Inst. 279, and F. N. B. 107.

(*n*) *Supra*, § 268.



a simple negative is its indefiniteness. "Words," says L. C. B. Gilbert, (o) "are but the expressions of facts; and therefore when nothing is said to be done, nothing can be said to be proved." "Negativa nihil implicat;" (p) "Negativa nihil pronunt." (q) A person asserts that a certain event took place, not saying when, where, or under what circumstances; how am I to disprove that, and convince others that at no time, at no place, and under no circumstances, has such a thing occurred? "Indefinitum æquipollet universali." (r) The utmost that could possibly be done in most instances would be, to show the improbability of the supposed event; and even this would usually require an enormous mass of presumptive evidence. "Coment que les testm," it is said in a very old case in our books, (s) "disont par certain discretion c fait nemy estre vray, uncore il est possible que le fait est vray, et les tesm scient rien de ceo; car ils ne fur pas al' temps de confecc psent, &c." Hence the well known rule that affirmative evidence is in general better than negative evidence. (t) But when the negative ceases to be a simple one,—when it is qualified by time, place, or circumstance,—much of this objection is removed; and proof of a negative may very reasonably be required, when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative. (u)

(o) Gilb. Ev. 145, 4th ed.

434; Wills, Circ. Ev. 224, 3rd ed.;

(p) 30 Ass. pl. 5; Long. Quint.

Stark. Ev. 867, 4th ed.

22 A.

(q) 18 Edw. III. 44 B. pl. 50.

(u) "Affirmativa melius probatur, quam negativa, cum negativa probari non possit. Hinc oritur regula illa vulgaris, duobus testibus affirmantibus magis credi, quam mille negantibus.

(r) 1 Vent. 368. See also Branch, Max. "Propositio indefinita, &c."

(s) 23 Ass. p. 11, per Thorpe, C. J.

. . . Natt. dicit eam esse rationem;

(t) 8 Mod. 81; 2 Curt. Eccl. Rep.

271. But here, two things must be particularly attended to : First, not to confound negative averments, or allegations in the negative, with traverses of affirmative allegations ; (*v*) and secondly, to remember that the affirmative and negative of the issue, mean the affirmative and negative of the issue in substance, and not merely its affirmative and negative in form. (*w*) With respect to the former, if a party asserts affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does not exist, or that a particular thing is insufficient for a particular purpose, and such like ; these, although they resemble negatives, are not negatives in reality—they are, in truth, positive averments, and the party who makes them is bound to prove them. Thus, in an issue out of Chancery, directed to inquire whether certain land assigned for the payment of a legacy was deficient in value, where issue was joined upon the deficiency, the one party alleging that it was deficient, and the other that it was not, it was held by the court (Holt, C. J., presiding), that though the averring that it was

eo quia deponens super affirmativa potest reddere causam magis probabilem, quia negativa non ita se offert sensui sicut affirmativa secundum Bal. &c. . . . Primò limita hoc esse verum in negativa non coarctata loco, et tempore, quia illa non cadit sub sensum testis : . . . si vero est munita loco, et tempore ita ut cadat sub sensum testis, et ex sui naturâ probari possit, ut si testis dicat illo die, et loco cum iudex ille sententiam tulisset inter Seium, et Mevium, pecunia, non domo Mevium multavit, ibi enim interfui et multam domûs irrogatam vidi : tunc par est virtus testis deponentis affirmativam, sicut negativam, et non magis creditur affirmantibus, quàm negantibus, &c." (Mascard. de

Prob. Concl. 70). "Probat qui asserit, non qui negat, eo quod per rerum naturam factum negantis probatio nulla est ; si modo negatio facti, et negatio simplex sit, nullis circumstantiis loci aut temporis munita : nam si vel juris negatio fiat, vel facti negatio qualitatibus loci atque temporis vestita sit, ipsi neganti probatio per leges imposita est ; cum hujusmodi inficiationes in se involvant affirmationem quandam." Voet. ad Pand. lib. 22, tit. 3, n. 10. See also Vinnius, Jurisp. Contract. lib. 4, c. 24, and Kelemen, Inst. Jur. Hungar. Privat. lib. 3, § 97.

(*v*) *Berty v. Dormer*, 12 Mod. 526 ; *Harvey v. Towers*, 15 Jurist, 544, 545 per Alderson, B.

(*w*) See *infra*, § 272.

deficient, is such an affirmative as implies a negative, yet it is such an affirmative as turns the proof on those that plead it; if he had joined the issue that the land was not of value, and the other had averred that it was, the proof then had lain on the other side. (x) So, in an action of covenant against a lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises in repair at the end of the term, the proof of the breach lies on the plaintiff. (y)

272. Again, as already mentioned, the incumbency of proof is determined by the affirmative in substance, not the affirmative in form. (z) "*Quis sit affirmans, vel negans non tam ex verborum figurâ, quam eorum sententiâ rei que naturâ colligitur.*" (a) "*Si issint soit come vous dits, uncore nostre affirmative comprend en luy meme u negative: car, &c.; issint affirmativa præsupponit negativam. Et en moultz cases 2 affirmatives, ou un comprend un negative, fer bon issue:*" per Rolf, arguendo, H. 8 H. VI. 22 B. "*Affirmativum negativum implicat.*" (b) The following cases will illustrate this: In *Amos v. Hughes*, (c) which was an action of *assumpsit* on a contract to emboss calico in a workmanlike manner; the breach was, that the defendant did not emboss the calico in a workmanlike manner, but, on the contrary, embossed it in a bad and unworkmanlike manner; to which the defendant pleaded that he did emboss the

(x) *Berty v. Dormer*, 12 Mod. 526.

(y) Ph. & Am. Ev. 828; *Harvey v. Towers*, 15 Jurist, 544, 545, per Platt, B. See also *Croft v. Lumley*, 6 H. L. C. 672.

(z) *Amos v. Hughes*, 1 Moo. & R. 464; *Ridgway v. Ewbank*, 2 Moo. & R. 217; *Smith v. Davies*, 7 C. & P. 307 *Soward v. Leggatt*, Id. 613; *Jef-*

*fries v. Clare*, 2 M. & W. 43, 46 per Alderson, B.

(a) Huberus, *Positiones Juris. sec. Pand. lib. 22, tit. 3, n. 10.* See ad id. Struvius, *Syntag. Jur. Civ. Exercit.* 28, § VI. and Vinnius, *Jurisp. Contract. lib. 4, cap. 24.*

(b) Branch, *Maxims.*

(c) 1 Moo. & R. 464.

calico in a workmanlike manner ; on which issue was joined ; Alderson, B., said that questions of that kind were not to be decided by simply ascertaining on which side the affirmative in point of form lay ; that supposing no evidence was given on either side, the defendant would be entitled to the verdict, for it was not to be assumed that the work was badly executed ; and consequently that the onus probandi lay on the plaintiff. In *Seward v. Leggatt*, (*d*) which was an action of covenant on á demise, whereby the defendant covenanted to repair a messuage, &c., and to paint the outside wood-work once in every three years, and the inside wood-work within the last six years of the termination of the lease ; the plaintiff alleged as breaches, that the defendant did not repair the messuage, &c., and did not paint the outside wood-work once in every three years, and did not paint the inside wood-work within the last six years of the term, but, on the contrary thereof, &c., and the defendant pleaded that he did, from time to time, at his own proper costs, &c., well and sufficiently repair the messuage, &c. ; and that he did paint the outside wood-work once in every three years during the term (specifying the times), and the whole of the inside parts that were usually painted, within the last six years of the termination of the term, to wit, &c., nor were the same ruinous, prostrate, &c., and in a bad state of order and condition for want of needful and necessary reparations, &c., nor were the same at the end of the term left by the defendant so ruinous, prostrate, &c. ; concluding to the country. On these pleadings each party claimed the right to begin,—contending that the burden of proof lay on him ; and Lord Abinger, C. B., said, “ Looking at these things according to common sense, we should

(*d*) 7 C. & P. 613.

consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases a party, by a little difference in the drawing of his pleadings, might make it either affirmative or negative, as he pleased. I shall endeavor, by my own view, to arrive at the substance of the issue.' And he held that the plaintiff had the right to begin, as the burden of proof lay on him.

273. 2. The burden of proof is shifted by those presumptions of law which are rebuttable; by presumptions of fact of the stronger kind; and by every species of evidence strong enough to establish a *prima facie* case against a party. When a presumption is in favor of the party who asserts the negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative. The subject of presumptions in general will be treated in the second part of the present book. (*e*)

274. 3. There is a third circumstance which may affect the burden of proof, namely, the capacity of parties to give evidence. "The law," says one of our old books, (*f*) "will not force a man to show a thing which by intendment of law lies not within his knowledge." "*Lex neminem cogit ostendere quod nescire præsumitur.*" (*g*) From the very nature of the question in dispute, all or nearly all the evidence that could be adduced respecting it, must be in the

(*e*) *Infra*, pt. 2, ch. 2.

(*f*) Plowd. 46 See *ad. id.* Plowd.

54-5, 123, 128, 129; Finch, Law, 48;

9 Co. 110: and T. 13 Edw. II. 407, tit. Covenant.

(*g*) Lofft. M. 569.

possession of, or be easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while the requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. (*h*) Thus where, in an action by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant offered to set off some cash notes issued by the bankrupt, payable to bearer, and bearing date before his bankruptcy, it was held that the defendant was bound to show that they came into his hands before the bankruptcy. (*i*)

275. 4. This rule is of very general application: it holds good whether the proof of the issue involves the proof of an affirmative or of a negative, and has even been allowed to prevail against presumptions of law. But the authorities are by no means agreed as to the extent to which it ought to be carried. In *R. v. Turner*, (*j*) Bayley, J., says, "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is

(*h*) Ph. & Am. Ev. 829; *R. v. Burdett*, 4 B. & A. 95, 140, per Holroyd, J.; *Dickson v. Evans*, 6 T. R. 57, 60, per Ashhurst, J.; *Calder v. Rutherford*, 3 B. & B. 302; *Sunderland Ma-*

*rine Insurance Company v. Kearney*, 16 Q. B. 925.

(*i*) *Dickson v. Evans*, 6 T. R. 57.

(*j*) 5 Mau. & S. 206, 211.

to prove it, and not he who avers the negative." But in *Elkin v. Janson*, (*k*) Alderson, B., on this dictum being quoted, said, "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the weight of the evidence, but there should be some evidence to start it, in order to cast the onus on the other side." And in *R. v. Burdett*, (*l*) Holroyd, J., states in the most explicit terms that the rule in question "is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened, by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

**276.** If this be the true principle, as it probably is, there are some cases in the books which seem to go much beyond it. At the head of these stand various decisions on the game laws, (*m*) and especially *R. v. Turner*, (*n*)—which was a conviction by two justices under the stat. 5 Ann. c. 14, sect. 2, (*o*) against a carrier, for having game in his possession;—and where the Court of Queen's Bench held it sufficient, if the qualifications in the 22 & 23 Car. 2, c. 25, sect. 3, were negatived in the information and ad-

(*k*) 13 M. & W. 655, 662.

(*l*) 4 B. & A. 95, 140.

(*m*) Several of them are referred to in *R. v. Turner*, 5 Mau. & S. 206.

(*n*) 5 Mau. & S. 206.

(*o*) This statute was repealed by the 1 & 2 Will. 4, c. 32: by the 42nd section of which, however, it is declared and enacted that it shall not be neces-

sary, in any proceeding against any person under that act, to negative by evidence any certificate, license, consent, authority, or other matter of exception or defense; but that the party seeking to avail himself of any such certificate, license, &c., or other matter of exception or defense, shall be bound to prove the same.

judication, although they were not negated by the evidence. This decision was based altogether on the rule under consideration, and on the argument *ab inconvenienti*, that the defendant must know the nature of his qualification if he had one : whereas the prosecutor would be obliged, if the burden of proof were cast upon him, to negative ten or twelve different heads of qualification enumerated in the statute ; which the court pronounced to be next to impossible. So, in *The Apothecaries Co. v. Bentley*, (*p*)—which was an action for a penalty under the 55 Geo. 3, c. 94, for practicing as an apothecary, without having obtained the certificate required by that act,—it was held, that the *onus probandi*, that the defendant had obtained his certificate, lay upon him. But the principle of these decisions is not of universal application. And, accordingly, in the case of *Doe d. Bridger v. Whitehead*, (*q*)—which was an ejectment by a landlord against a tenant, on an alleged forfeiture by breach of a covenant in his lease, to insure against fire in some office in or near London, and in which it was contended that it lay on the defendant to show that he had insured, that being a fact within his peculiar knowledge ; and the argument *ab inconvenienti* was strongly urged, viz., that the plaintiff could not bring persons from every insurance office in or near London, to show that no such insurance had been effected by the defendant ; and *R. v. Turner, The Apothecaries Co. v. Bentley*, and some other cases of that class, were cited :—Lord Denman, C. J., in delivering judgment, said, (*r*) “ I do not dispute the cases on the game laws which have been cited ; but there the defendant is, in the first instance, shown to have done an act which

(*p*) Ry. & Mood. 159.

(*r*) 8 A. & E. 575.

(*q*) 8 A. & E. 571.



was unlawful unless he was qualified; and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law." And in the same case, Littledale, J., said: (s) "in the cases cited as to game, the defendant had to bring himself within the protection of the statutes;" "a like observation applies to *The Apothecaries Co. v. Bentley*. But here, where a landlord brings an action to defeat the estate granted to the lessee, the onus of proof ought to lie on the plaintiff." And this ruling has been upheld by subsequent cases. (t)

277. It remains to add, that the difficulties attending the application of this principle to criminal charges, have been felt in America as well as here, as appears from the following passage in *Greenl. Evid.* vol. 3, § 24, note (2), 2d ed.:

"The question as to the burden of proving the negative averment of disqualification in the defendant, arising from his want of license to do the act complained of, was fully considered in the *Commonwealth v. Thurlow*, 24 Pick. 374, which was an indictment for selling spirituous liquors without license. The Chief Justice, Shaw, delivered the judgment of the court upon this point in the following terms:

"The last exception necessary to be considered is that the court ruled that the prosecutor need give no evidence, in support of the negative averment that the defendant was not duly licensed; thereby throwing on

(s) *Id.* 576.

*wood v. Hart*, 2 Jurist, N. S. 288;

(t) See *Toleman v. Portbury* (in *Price v. Worwood*, 4 H. & N. 512. *Cam. Scac.*), L. Rep. 5 Q. B. 288 *Wedg-*

him the burden of proving that he was licensed, if he intends to rely on that fact by way of defense. The court entertained no doubt that it is necessary to aver in the indictment, as a substantive part of the charge, that the defendant, at the time of selling, was not duly licensed. How far, and whether under various circumstances, it is necessary to prove such negative averment, is a question of great difficulty, upon which there are conflicting authorities. Cases may be suggested, of great difficulty, on either side of the general question. Suppose, under the English game laws, an unqualified person prosecuted for shooting game without the license of the lord of the manor, and after the alleged offense and before the trial, the lord dies, and no proof of license, which may have been by parol, can be given? Shall he be convicted for want of such affirmative proof, or shall the prosecution fail for want of proof to negative it? Again, suppose under the law of this Commonwealth, it were made penal for any person to sell goods as a hawker and pedlar, without a license from the selectmen of some town in the Commonwealth. Suppose one prosecuted for the penalty, and the indictment, as here, contains the negative averment, that he was not duly licensed. To support this negative averment, the selectmen of more than three hundred towns must be called. It may be said, that the difficulty of obtaining proof is not to supersede the necessity of it, and enable a party having the burden to succeed without proof. This is true; but when the proceeding is upon statute, an extreme difficulty of obtaining proof on one side, amounting nearly to impracticability, and great facility of furnishing it on the other, if it exists, leads to a strong inference, that such course was not intended by the legislature to be required. It would

no doubt be competent for the legislature so to frame a statute provision, as to hold a party liable to the penalty, who should not produce a license. Besides the common-law rules of evidence are founded upon good sense and experience, and adapted to practical use, and ought to be so applied as to accomplish the purposes for which they were framed. But the court have not thought it necessary to decide the general question; cases may be affected by special circumstances, giving rise to distinctions applicable to them to be considered as they arise. In the present case, the court are of opinion that the prosecutor was bound to produce *prima facie* evidence that the defendant was not licensed, and that, no evidence of that averment having been given, the verdict ought to be set aside. The general rule is, that all the averments necessary to constitute the substantive offense, must be proved. If there is any exception, it is from necessity, or that great difficulty, amounting practically to such necessity; or, in other words, where one party could not show the negative, and where the other could with perfect ease show the affirmative. But if a party is licensed as a retailer under the statutes of the Commonwealth, it must have been done by the county commissioners for the county where the cause is tried, and within one year next previous to the alleged offense. The county commissioners have a clerk, and are required by law to keep a record, or memorandum in writing, of their acts, including the granting of licenses. This proof is equally accessible to both parties; the negative averment can be proved with great facility, and therefore, in conformity to the general rule, the prosecutor ought to produce it before he is entitled to ask a jury to convict the party accused.”<sup>1</sup>

This point has since been settled otherwise, in Massachusetts, by stat. 1844, ch. 102, which devolves on the defendant the burden of proving the license.<sup>1</sup>

<sup>1</sup> So it is held at common law, in North Carolina: *The State v. Morrison*, 3 Dev. 299. And in Kentucky: *Haskill v. Commonwealth*, 3 B. Monr. 342. And in Maine: *State v. Crowell*, 12 Shepl. 171. And in Indiana: *Shearer v. The State*, 7 Blackf. 99. See also, on this subject, *Commonwealth v. Kimball*, 24 Pick. 366.

# CHAPTER III.

## HOW MUCH MUST BE PROVED.

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**278.** The just and reasonable principle, that tribunals should look to the meaning rather than to the language of the pleadings, or other statements of litigant parties, is not confined to the burden of proof, but extends to the proof itself. The rule of law from the earliest times has been, that it is sufficient if the issues raised are proved in substance. (a) This is in

(a) Litt. ss. 483, 484, 485; Co. Litt. 227 a, 281 b, 282 a; Hob. 73, 81; 2

truth only a branch of a still more general principle, which runs through every rational system of jurisprudence. "*Lex rejicit superflua*," (*b*) "*Superflua non nocent*," (*c*) "*Utile per inutile non vitiatur*." (*d*)

279. The most obvious application of this rule is, in the case of averments and statements, wholly immaterial. All averments which might be expunged from the record, without affecting the validity of the pleading in which they appear, may be disregarded at the trial; for such averments only incumber the record, and the proof of them would be as irrelevant as themselves. (*e*). And there can be no doubt that the same principle applies to allegations and statements made otherwise than in formal pleadings. All this, however, must be understood of pleadings which show a good ground of action or defense in law; for it is a rule that a bad pleading must be proved in omnibus, to entitle the party pleading it to a verdict. (*f*)

280. But matter which need not have been stated may be injurious, or even fatal, when it affects that which is material. A party may allege or prove things which he was not bound to allege or prove, but which, when alleged or proved, put his case out of court. (*g*) Thus where, before the 15 & 16 Vict. c. 76, s. 64, a party, in giving express color, stated a true title in his

Rol. 41-2; Tryals per Pais, 140, ed. 1665; 1 Phill. Ev. 558, 10th ed.; 1 Stark. Ev. 431, 3rd ed.; Id. 625, 4th ed. For earlier authorities, see bk. 1, p. 2, § III, note (g).

(*b*) Jenk. Cent. 3, cas. 72.

(*c*) Jenk. Cent. 4, cas. 74; Cent. 8, cas. 41.

(*d*) Co. Litt. 3 a, 227 a, 379 a; 3 Co. 10 a; 10 Co. 110 a; Hob. 171; 2 Saund. 369; 1 Stark. Ev. 432, 3rd ed.; Id. 625, 4th ed. "*Non solent, quæ abundant, vitiare scripturas*" (Dig. lib. 50, tit. 17, l. 94). "*Utile non*

debet per inutile vitiari." Sext. Decretal. lib. 5, tit. 12. De Reg. Jur. Reg. 37.

(*e*) 1 Phil. Ev. 558, 567, 568, 10th ed.; 1 Stark. Ev. 432, 3rd ed.; Id. 626, 4th ed.

(*f*) Walker v. Goe, 3 H. & N. 405, Mardall v. Thelluson, 6 E. & B. 980, per Creswell, J.

(*g*) 1 Edw. V., 3, pl. 5; Keilw. 165 b, pl. 2; Plowd. 32, 84; Finch, Law, 65; and Lush v. Russell, 5 Exch. 203.

adversary instead of a defective one, the latter was entitled to judgment on the pleader's own showing. (*h*) It is accordingly a rule that averments, though unnecessarily introduced, cannot be rejected when they operate by way of description or limitation of essentials. (*i*) "Let an averment of this kind," says an eminent authority on evidence, (*j*) "be ever so superfluous in its own nature, it can never be considered to be immaterial when it constitutes the identity of that which is material."

281. This rule does not merely absolve from proof of irrelevant matter. It has a far more general application, and means that the tribunal by which a cause is tried should examine the record or allegations of the contending parties, or of their advocates, as the case may be, with a legal eye, in order to ascertain the real question raised between them. In illustration we shall first cite some old authorities, both because they are very apposite, and also to show that the rule under consideration is not an arbitrary invention of modern times,—a light in which it is too common to view all the rules of evidence.

282. "If," says Littleton, (*k*) "a man bring a writ of entry in casu proviso, of the alienation made by the tenant in dower to his disinherittance, and counteth of the alienation made in fee; and the tenant saith, that he did not alien in manner as the demandant hath declared, and upon this they are at issue; and it is found by verdict that the tenant aliened in tail, or for term of another man's life, the demandant shall recover: yet the alienation was not in manner as the demandant

(*h*) Steph. Plead. 245, 5th ed.

(*i*) 1 Stark. Ev. 443, 3rd ed.; Ph. & Am. Ev. 853; 1 Ph'll. Ev. 567, 10th

ed.; Webb v. Ross, 5 Jurist, N. S. 126, 127, per Martin, B.

(*j*) 1 Stark. Ev. 443, 3rd ed.

(*k*) Litt. sect. 483.

hath declared." "Also, (*l*) if there be lord and tenant, and the tenant hold of the lord by fealty only, and the lord distrain the tenant for rent, and the tenant bringeth a writ of trespass against his lord for his cattle so taken, and the lord plead that the tenant holds of him by fealty and certain rent, and for the rent behind he came to distrain, &c., and demand judgment of the writ brought against him, *quare vi et armis*, &c., and the other sayeth that he doth not hold of him in the manner as he suppose, and upon this they are at issue, and it is found by verdict that he holdeth of him by fealty only; in this case the writ shall abate, and yet he doth not hold of him in the manner as the lord hath said. For the matter of the issue is, whether the tenant holdeth of him or no; for if he holdeth of him, although that the lord distrain the tenant for other services which he ought not to have, yet such a writ of trespass *quare vi et armis*, &c., doth not lie against the lord, but shall abate." "Here it appeareth," says Lord Coke, (*m*) "that if the matter of the issue be found, it is sufficient;" and, as illustrations of this he gives, amongst others, the two following cases, supported by the authority of an early Year Book. "In assise of darreine presentment, if the plaintiff allege the avoydance of the church by privation, and the jury find the voydance by death, the plaintiff shall have judgment: for the manner of voydance is not the title of the plaintiff, but the voydance is the matter. (*n*) If a guardian of an hospital bring an assise against the ordinary, he pleadeth that in his visitation he deprived him as ordinary; whereupon issue is taken, and it is found that he deprived him as patron; the ordinary

(*l*) Litt. sect. 484.(*m*) Co. Litt. 282 a.(*n*) Co. Litt. 282 a; 6 Edw. III

41 b, pl. 22.



shall have judgment, for the deprivation is the substance of the matter." (*o*)

283. The books contain many other instances of the effect of this rule. (*p*) Thus, in an action on a bond, a plea of solvit ad diem is supported by proof of payment ante diem; (*q*) for the payment, so as to save the penalty, is the matter in issue. In an action against a tenant for waste in cutting down a certain number of trees, proof that the defendant cut down a less number maintains the issue. (*r*) Although in actions on contracts the contract must be correctly stated, and proved as laid; yet every day's practice shows that in actions on simple contract, as also in actions of tort, the plaintiff may recover for a less sum than that claimed in the declaration. And in actions of tort it is generally sufficient to prove a substantial portion of the trespasses or grievances complained of.

284. The rule in question is not confined to civil cases. (*s*) It is a principle running through the whole criminal law, that it is sufficient to prove so much of an indictment as charges the accused with a substantive crime. (*t*) And what averments in an indictment are so separable and divisible from the rest, that want of proof of those averments shall not vitiate the whole, forms an important head of practice. For instance: on an indictment for burglary and stealing goods in the house, the averments of breaking and stealing are divisible, so that if the burglary be not proved the accused may be convicted of larceny; (*u*)

(*o*) Co. Litt. 282 a; 8 Edw. III. 70. pl. 37; 8 Ass. pl. 29.

(*p*) For other instances to be found in the old books, see 2 Rol. Abr. 681, Evidence (D).

(*q*) Ph. & Am. Ev. 486; 1 Phill. Ev. 559, 10th ed.

(*r*) Co. Litt. 282 a; Ph. & Am. Ev. 847.

(*s*) Co. Litt. 282 a; Ph. & Am. Ev. 849; 1 Phill. Ev. 562, 10th ed.

(*t*) 1 Phill. Ev. 562, 10th ed.; R. v. Hunt, 2 Camp. 583.

(*u*) 1 Hale, P. C. 559.

as he also may on a charge of robbery. where it appears that the taking was not with violence. (*x*) And on an indictment for murder, the accused may be (and often is) convicted of manslaughter; for the substance of the offense charged is the felonious slaying,—malice aforethought being only an aggravation. (*y*)

By several modern statutes, also, a like principle has been extended to various offenses not actually charged in the indictment. Thus, by the 24 & 25 Vict. c. 100, s. 60, a person indicted for child murder, may, though acquitted of the murder, be convicted of the misdemeanor of concealing the birth of the child. So, by the 14 & 15 Vict. c. 100, s. 9, it is enacted, that “If on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence, that the defendant did not complete the offense charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned, shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.”

And, by sect. 12 of the same statute, it is enacted, that “If upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence

(*x*) Id. 534, 535, *Harman's Case*. Litt. 282 a; Gilb. Evid. 269, 4th ed.  
 (*y*) Bro. Ab. Corone, pl. 221; Co. ed.

amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no persons tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

Again: by the 24 & 25 Vict. c. 96, s. 41, it is enacted, that "If upon the trial of any person upon any indictment for robbery, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason hereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished, in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

So, by the 24 & 25 Vict. c. 96, s. 72, it is enacted, that "If upon the trial of any person indicted for embezzlement, or fraudulent application, or disposition, &c., it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of em-

bezzlement, or fraudulent application, or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application or disposition as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or embezzlement upon the same facts."

And, lastly, it is enacted by the 24 & 25 Vict. c. 96, s. 94, that "If upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of such property."

285. But although the law is thus liberal in look-

ing through mere form, in order to see the real substance of the questions raised, a positive variance or discrepancy between a pleading and the proof adduced in support of it was always fatal—a rule absolutely necessary to prevent the opposite party from being unfairly taken by surprise, and the whole system of pleading converted into a snare. Still this principle, however salutary in itself, was certainly carried too far; and indeed it would be strange, if the super-subtile spirit which in the fourteenth and fifteenth centuries took possession of our pleadings, had not extended its influence to their proof. (z) The consequence was, that the best causes were continually lost through variances of the most unimportant kind; in order to obviate the danger of which, practitioners resorted to the plan of stating the same cause of complaint in different counts; and, whenever they could obtain leave of the court under the statute 4 Ann. c. 16, stating the same subject-matter of defense in different pleas, varied only in circumstances. But this statute did not apply to replications and subsequent pleadings; (a) and the devices just mentioned while they added very considerably to the intricacy of pleadings and expense of suits, had not always the desired effect.

The attention of the legislature was at length turned to this subject; and by the 9 Geo. 4, c. 15, power was given to every court of record holding plea in civil actions, to any judge sitting at nisi prius, and to any court of oyer and terminer and general jail delivery, if such court or judge should see fit so to do, to cause the record on which any trial might be

(z) See Co. Litt. 303 a, 304 a and b.

(a) By 15 & 16 Vict. c. 76, s. 81, several matters might, by leave of the court or a judge, be pleaded at any

stage of the pleadings. And see Rules of Court under "The Supreme Court of Judicature Act, 1873," Orders 18 and 19.

pending before any such judge or court in any civil action, or in any indictment, or information for any misdemeanor, when any variance appeared between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial was pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such judge or court should think reasonable. Whereupon the trial should proceed as if no such variance had appeared.

286. This statute, it is obvious, went a very short way towards remedying the evil. It was, however, afterwards met more vigorously in civil cases, by the Pleading Rules of H. T. 4 Will. 4,—to which was given the force of an act of parliament,—and by the statute 3 & 3 Will. 4, c. 42, s. 23.

The power of amendment was again much increased, by the Common Law Procedure Acts, 15 & 16 Vict. c. 76, ss. 35, 37, and 222; 17 & 18 Vict. c. 125, s. 96; and 23 & 24 Vict. c. 126, s. 36,—a general power of amendment having been conferred by sect. 222 of the first of these acts, in the following terms: viz., that “It shall be lawful for the Superior Courts of Common Law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments, as may be necessary for the purpose of determining in the existing suit the real ques-

tion in controversy between the parties, shall be so made."

287. The power of amendment was also extended by other statutes to other kinds of proceedings: *E. g.* by the 16 & 17 Vict. c. 107, s. 263, it was extended to "all suits or proceedings at the suit of the Crown for the recovery of any duty or penalty, or the enforcement of any forfeiture under any act relating to the customs." By 20 & 21 Vict. c. 77, s. 37, it was extended to the trial of questions by a jury under the order of the Court of Probate. By the 20 & 21 Vict. c. 85, s. 38, it was extended to trials by jury under the order of the Court for Divorce and Matrimonial Causes. And by the 22 & 23 Vict. c. 21, s. 9, it was extended to all suits and proceedings on the revenue side of the Court of Exchequer.

288. And now, by the Supreme Court of Judicature Act, 1873, (b) the court or a judge may, at any stage of the proceedings, allow either party to alter his statement of claim, or defense, or reply, or may order to be struck out or amended, any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action: and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

289. In exercising the discretion vested in them by these statutes, courts and judges will of course be much guided by the decisions which have taken place on the subject; although these, it must be acknowledged, are by no means in conformity with each other:

(b) 36 & 37 Vict. c. 66, sched. rule 18.

(*c*) But this much may be stated, viz., that, in the first place, it seems that no judge ought to make an amendment, the effect of which would be to deprive him of jurisdiction over the cause. (*d*) Again, as the object of these statutes was to carry out the spirit of the law and not to supersede it, no pleading ought to be amended so as to render it bad in law, (*e*) or which might tend to prejudice, embarrass, or delay the fair trial of the action. (*f*) And, lastly, it is to be observed generally, that the courts in banc have been very chary of interfering with the discretion of judges at nisi prius, in granting or refusing amendments; unless where the point was reversed for their consideration by consent of parties at the trial.

290. It will be observed that, while the 9 Geo. 4, c. 15, extended to trials for misdemeanors, the 3 & 4 Will. 4, c. 42, s. 23, and the other statutes above referred to, were, for the most part, restricted to civil cases. But the 11 & 12 Vict. c. 47, s. 4, empowers any court of oyer and terminer and general jail delivery, if such court shall see fit so to do, to cause the indictment or information for any offense whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court; and after such amendment the trial shall proceed in the same manner in all respects,

(*c*) See a large number collected in the note to *Bristow v. Wright*, 1 Smith, L. C. 570, 5th ed.

(*d*) *Wickes v. Grove*, 2 Jur., N. S. 212, 213, per Martin, B.

(*e*) *Evans v. Powis*, 1 Exch 601; *Martyn v. Williams*, 1 H. & N. 817; *Bury v. Blogg*, 12 Q. B. 877; *Graham*

*v. Gracie*, 13 Id. 548; *Hughes v. Bury*, 1 Fost. & F. 374.

(*f*) Under the 3 & 4 Will. 4, c. 42, s. 23, it was held, that a judge ought not to amend a plea, so as to render it liable to special demurrer. *Bury v. Blogg*, 12 Q. B. 887; *Hassall v. Cole*, 13 Jur. 630.



&c., as if no such variance or variances had appeared.

291. And a far greater alteration in the law on this part of the subject, has been effected by the 14 & 15 Vict. c. 100, some portions of which have been already referred to. (*g*) This statute enacts, in its first section, that "Whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offense charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offense, or in a christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense on such merits, to order such indictment to be amended, according to the proof by some officer of the court or other person, both in

(*g*) *Supra*, § 284.

that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable ; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, as if no such variance had occurred : Provided that, in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly : Provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges, as they were respectively entitled to before the first jury was sworn."

**END OF VOLUME I**







